

EXHIBIT G

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Volume 7, Number 8

Best Wishes for a Joyous Holiday Season!

November/December, 1991

CAMBRIDGE ON THE MOVE!

WORKSHOPS AND RETREATS: THEY CAME FROM BOSTON TO TAIWAN

CAMBRIDGE HIGHLIGHTED ON NBC BOSTON AFFILIATE WBZ-TV! (see page 9)



Houston - 1-Day Workshop! Los Angeles - Lady Cambridge presents to Food For All! San Diego - Retreat! New Jersey - Retreat! Boston - Retreat!

On The Move

October and November—exciting months for Cambridge! Linda Hevern, Dr. Nan Brenzel, Lady Cambridge Barbara Lazar, Lynne Murphy, and special Consultant Cecelia Chen, participated in meetings throughout the country. First stop: Houston, where a 1-day workshop designed to unify personal development with business acumen. Nan, Lynne and Linda worked with a group of 25 brought together by Donna Dugan, Circle of Champions. Although success with the product brought them into Cambridge, it is their personal strength that contributes to their success.



This full-day workshop covered "how-to's" on harnessing these same strengths to give their Cambridge business renewed energy. At the same time, the workshop pointed out areas that can be stumbling blocks to both your business and personal program. Simple steps on how to deal with and overcome these blocks were discussed.

Natural Markets

A highlight of this exciting day was Cecelia Chen, a special new Consultant from Taiwan and a sterling example of "natural markets", sharing news about her Taiwan Cambridge business. Cecelia, who markets Cambridge products through beauticians and spas, spoke enthusiastically about how well accepted Cambridge products and programs have been in her country.



The Houston group also included Marie Carner, an inspiration to many, who lost 40 pounds and has kept it off for 2 years. Recently Marie sole sourced, losing an additional 12 pounds. She's fit, feels tremendous, and looks fantastic! One of her secrets is Super Oats—three times a day. Plus, says

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THE ART OF STRATEGIC VISION™

Season's Greetings!

The year-end holidays are always a time for reflection and renewal. I have been reviewing the last 6 months of events since my very first conversations in July with Cambridge Leaders.

My initial talks were with the Circle of Champions and at that time I wanted to know from them the problems needing to be addressed, and what would make their businesses better.

It has been gratifying for me to realize how much has been accomplished since I first spoke with the Circle of Champions.

In July Paul Parker told me we needed some positive media. In these last two months Cambridge has been featured on radio, and television and a press release about our participation in Food For All has gone out. Additionally, Lynne Murphy will be on cable television in Virginia to show her "before" and "after" Cambridge. We are moving in proactive media.

In July Barbara Lazar told me she could "not do the business with out a prospecting piece"...we have just given you two outstanding pieces, both

designed by the field.

In July Janice Jones told me she was losing her "zip" ...she has it back—after the Boston Retreat, she is flying!

In July Ann Wetzler asked that Questions and Answers be made readily available, and they have been designed into our upcoming Program Guide.

In July Donna Dugan stated that she was looking for dramatic results in her business. What has happened? Since our October workshop, she has dramatically risen to a whole new professional level, giving nutritional lectures at the University and charging a fee for her support groups.

Since July, Nan, Lynne and I have collaborated in the development of training programs and materials that address the needs you have described. Our curriculum is designed to help you in managing your weight and your business.

And, after my three Retreats and 20-day sole source odyssey, I feel I am a true part of the "Cambridge Experience." I have caught the missionary zeal, and know I was truly fortunate to have Nan and Lynne as my Partners In Progress during my 20-day sole source odyssey.

What we have in store for you in 1992 is a whole new vista of possibilities to help you in your personal and business development, such as:

- A beautiful new Cambridge poster.
- A new Program Guide and companion cook book.
- Scripts to show you how to make presentations to corporations, community groups, and others interested in nutrition and weight management.
- A Retreat presentation handbook and Retreat kit to help you lead your own Retreats.

• Support Meeting Manual.

A whole year's worth of training modules, including everything you need to know about weight management, taking customers from starting the program to maintaining their weight.

• An expanded Advanced Career Training program.

Our vision is a continual striving to be better. Our Mission is to become the leader in the industry of health, nutrition, weight management and optimal health. Our goal is to contribute to a growing and prospering enterprise, our objective is to give you the training, opportunity and materials you need to attain success, our action plan has been to evaluate needs, create and develop the programs and

materials you need to succeed.

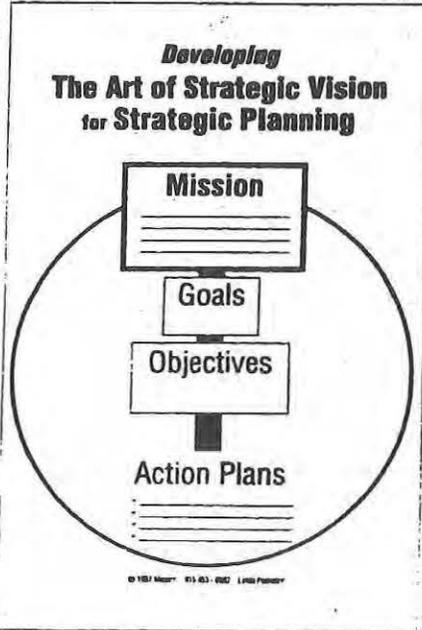
In addition we are reviewing the marketing plan and exploring how we can set up your best opportunity to grow your business, and flourish in our collective future.

We're excited about our progress and the materials in production and know they will give you the support you have needed for a long time.

I look forward to working with you in 1992 and turning our "grand" dreams into a significant reality.

Wishing you Health & Prosperity for this exciting New Year!

Linda
Linda Hovern
Executive Vice President



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Models of Excellence

JANICE JONES . . . DIRECT SALES AT ITS BEST!

One of our top Leaders, Janice Jones, exemplifies what direct sales can be — an extremely profitable, solid home-based business to which she devotes 3 days a week. Since reaching her target weight and joining Cambridge as a Consultant in 1981, Janice has found this business has changed her life. At 53, looking 15 years younger, Janice is an example of what Cambridge can do for you. A true New-Englander, she is a self-proclaimed no-nonsense person. Strong, yet soft, this is reflected in her successful business.

It was Mel Jones, Janice's husband, who encouraged Janice to join Cambridge after reducing her weight and he fully supports her efforts. "He's wonderfully supportive, but I did the work!" quips Janice at the Boston Retreat, as she noted her ongoing PIP is her husband. When she goes off track, as she did this summer, it's Mel who will remind her to just get back to basics. "It's a simple business," she says. "Keep it that way."

According to Janice: "There are 3 phases to this business, and you need them all."

1. RETAIL - This is what keeps you alive — you must have it. These are the customers I occasionally give small gifts to—flavorings for example—just to let them know I appreciate their business. Janice has a large retail clientele, and she regularly works referrals from these people.

2. WHOLESAL - You need wholesale buyers. Last month alone, I did \$6,000 in wholesale business through my

downline. But, put it into perspective. Wholesale buyers are those retail customers who have referred 3-4 people to you and are committed to the product over a long term; that is, those who are at target weight, are committed to maintain that weight, and understand its value as lifetime nutrition. Protect your retail business by carefully selecting those you offer the oppor-

tunity to become wholesale buyers.

3. LEADERS - A key group of strong Leaders. I work with them constantly. Currently Janice and one of her Leaders, Jan Cookson, are working trade shows (e.g. bridal fairs and Chamber of Commerce shows).

"You shouldn't expect to come home with actual sales,

but lots of leads, which you need to follow up," she states.

Having always worked from her home, Janice's largest business expense is her telephone. I talk to a lot of people, and have a separate line for Cambridge business. Recently Janice added a personal or business 800 number which is now available from AT&T. It costs just \$6 a month plus 32 cents per minute. With

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"IT WORKS,
IF YOU
WORK IT!" . . .
JANICE JONES, BOSTON



Janice Jones, Jan Cookson

"I had a great day and it was FUN!" confided Janice during a 10 pm phone call one Tuesday in October. Janice and Jan Cookson attended a recent Chamber of Commerce Trade Show in Andover, Massachusetts — declining to take a \$300 booth, they paid the \$1 attendance fee and took a shot at "working" the show. And work it they did! They talked to everyone who would listen about the product — and the people listened.

Professionals dealing with professionals. They talked about the product and nutrition, how well it fits into busy lifestyles and how effective it is. One day and several leads later, plus 2 appointments with individ-

uals to buy the product, they're both eager to join the Chamber and are scouting around for other trade shows to "work". Here are a few tips:

1. Look into joining your local Chamber of Commerce. If they are an active group, networking will work for you. Only one person is required to join and they usually allow 4-6 individuals from one organization to use the membership. Split the cost and get the mileage. That's effective PR!

2. While Jones and Cookson shared a table at lunch with others, they enjoyed the new Cambridge Plantation Peanut Bar and fielded questions this brought, and leads.

3. "I have a small business — I'd love to give you my card and flyer. Would you be

interested?" This is Janice's opening, and it works! This eases the concern of many about how to approach someone about reducing weight.

That same day, while waiting at a local copy center, Janice shared her flyer and card with a fellow patron — not someone who obviously needed to reduce weight. The woman's reply was classic. Just that day she and a co-worker discussed how to find a product other than Slim Fast. A principal at a local school, she invited Janice to make a presentation to the teachers.

The moral of this story is: Don't prejudice. You have a business—share your story.

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*Jones' Model of Excellence
(continued from page 4)*

clients throughout New England, she feels the 800 line will boost her business. "The telephone is the backbone of my business," adds Janice. "I'm amazed when I hear Consultants say they have nothing to say to their customers and ex-customers."

"Bologna!" states Jones, in her typical fashion. "There's always something to say. A new flavoring, a recipe, or Eggnog is back. It is hard at times. I may have to psyche myself up. But I do it."

"Whenever I get on the phone, I sell. Last Sunday night, once I got started, I sold 9 cans. I always sell multiple cans — at least 3, which is a two-week supply. Sunday is great. People are home, they're relaxed, and they want to talk. Most people want love and attention, and when you call, you're giving it to them! If you hear negative, be positive. ("I was just going through my list, and came across your name. It got me thinking about you, and I decided to give you a call. Then I ask them how they are doing.") It's that simple," says Janice.

Use the familiar "feel, felt, found" often used in sales. It tells them you understand and are listening. For example:

"I know how you FEEL about liquid diets. I have many people who FELT the same way when they first started. But once they realized how nutritious it is, and how good they feel, they've FOUND they love it and have few problems."

"Most people are glad you call. When people come to my home, it's still simple. I

have an appointment book and my business cards. When they make an appointment for support, I mark it down and write the time on one of my cards, which I give to them. I usually have them call within two days to get started. I keep every name in my notebook, and note the day they start. Then I call them regularly."

At our initial meeting I tell them they have to do three things:

1. They have to take the product 3 times a day. Why? It's their full nutrition.
2. They have to drink water. Why? Where is the fat going to go? Out their ears? It's eliminated through the urine, and you need the water.
3. They have to decide how they are going to use the product along with conventional food.

I weigh them. I measure them. And in two weeks I take their measurements again to remind them that when the scale doesn't move, the measuring tape will.

I do a small amount of advertising, just to let people know I'm still here. And this Fall, she has placed classified ads in WORKING WOMAN magazine. Fully aware that she needs to spend money to make money, Janice is not afraid to make a mistake.

"You need the discipline to do a little something every day," she says. Yet, as successful as she is with her business, Janice saves Monday for herself, and Friday morning for tennis. To simplify her business she uses a computerized software program designed for Cambridge,

but basically she manually keeps her books with a simple cash journal. KISS—Keep It Slim & Simple



*"This product makes sense!"
says Janice Jones*

*Cambridge On The Move
(continued from page 1)*

Marie, she keeps her scale next to her stove, stepping on it daily as she makes breakfast for her family. When the scale creeps up, she reduces her food intake.

Our Fall schedule of Retreats has been in full swing. Retreats in San Diego, New Jersey, and Boston are completed. All three Retreats resulted in exciting recommitments to the Cambridge business. "Rising stars" were identified—Nancy Merrill and the DeFeo's, to name two. Having made a commitment to their program, Dr. Nan urged Retreat attendees to agree to a program and put into effect a follow-up procedure with the home office. Inspiration and support is just a phone call away!

The magic of Retreats builds! Attendees seeking the inspiration that will make them the next success story. After last October's Georgia Retreat, Margaret Neff of Jacksonville,

Florida, faithfully followed her program through New Year's, maintained, and after again attending our recent Asbury Park, New Jersey Retreat, leaving with a renewed commitment to her program. Carole Matthews from Petersburg, Virginia, another attendee at the New Jersey Retreat, leaving with new answers to her program. — What is the magic? It's understanding, support, the program. It's the product. It's the bonding — special people doing special things. Key to the success of the Retreats is the excellent indepth information Dr. Nan shares about nutrition, eating behaviors, as well as other valuable knowledge. But, additionally, what makes it work is the one-on-one's that occur throughout the meetings — shared hints, secrets that will get you over a rough spot, "what works for me's", hearing from those who have been successful, and recipes. The upcoming cookbook is a reflection of just this kind of sharing by Retreat participants over the last 24 months.

In Los Angeles, Linda Hevern, Executive Vice President, and Barbara Lazar, Lady Cambridge, jointly presented a check to Milan Hamilton, President of Food For All. The check represented a pledge Cambridge made — to aid in ending hunger, which is consistent with the Cambridge mission of promoting optimal health through well-balanced nutrition. Attended by Kay Marovich, LA Area Distributor, and local media, it was an exciting day for all.

Cambridge is on the move! Watch for news on events in your area.

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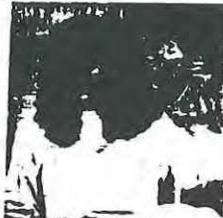
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Marie Carner proudly shared her "before" and "after" photos at the Houston Workshop. Marie has reduced by 52 pounds and has kept it off for 2 years.



Loretta and Lou DeFeo with Ann Wetzler "celebrating" during the Wetzler Retreat in Asbury Park, NJ.



New Jersey Retreat: Kim Cavana plays with images as she maps out her vision, goals, and objectives.



Mari Lowrey in October 1990, "before" Cambridge, with proactive media Leaders Betty and Paul Parker.



Mari Lowrey in October 1991, "after" Cambridge, with Dr. Nan at the Parker's Retreat in San Diego.

San Diego, New Jersey, Boston—wherever we were we heard comments like these:

"Thank You! What a wonderful company and loving people!"

"...This one helped me quit smoking."

"Really great people in charge".

It's refreshing to see inspirations like Kim Cavana, and the DeFeo's who attended the New Jersey Retreat. Loretta and Lou have both maintained their weight reduction for close to 9 years, and to show his support and pride in Loretta's trim, youthful appearance after 25 years of marriage, they celebrated with an impulse purchase in the hotel boutique—a slinky, red holiday dress! Even Ann Wetzler thought Loretta looked fabulous!

Nan and Linda, working together, were a hit in San Diego..."Nan, you were so wonderful, and the sharing of yourself and the love you give to everyone is so wonderful."

"Both of you are so wonderful..."

"Linda, thanks for being here and giving new hope to Cambridge!"

Cecelia Chen, alight with the Cambridge "glow", delighted her Houston audience with amusing anecdotes about her experiences in Taiwan. Having reduced over 20 pounds herself using Cambridge, she is a true believer. Her parents, firm believers in wellness and longevity, are now avid users of the Cambridge product.

Our search for "rising stars" includes Sally Hennessey (on crutches) and Raphael Lara, both who recommitted to their Cambridge business in Asbury Park. Sally, who is already planning a weekend Retreat of her own in December, was revitalized by the New Jersey Retreat.

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TRIBUTES

Recognition based on combined volume for August & September 1991.

TOP CIRCLE OF CHAMPIONS



- | | Name | Location |
|----|--------------------|--------------------|
| 1. | Donna & Bob Dugan | Houston, Texas |
| 2. | Bety & Paul Parker | LaMesa, California |

TOP CONSULTANTS

Photo Not Available

- | | Name | Location |
|----|------------------|----------------------|
| 1. | Ruby McBrayer | Jackson, Mississippi |
| 2. | E. Ruth Saulnier | Tenino, Washington |

TOP AREA DIRECTORS



- | | Name | Location |
|----|----------------------|--------------------|
| 1. | Millie & Billy Chron | Burton, Michigan |
| 2. | Mike Kirkland | Covina, California |

TOP PERFORMING ORGANIZATIONS

- | Rank | Name | State |
|------|---------------------------------|-------|
| 1. | Donna & Bob Dugan | TX |
| 2. | Betty & Paul Parker | CA |
| 3. | Janice & Mel Jones | MA |
| 4. | Barbara & Gary Lazar | FL |
| 5. | Kay & Dan Marovich | CA |
| 6. | Bill & Bety Gray | CO |
| 7. | Millie & Billy Chron | MI |
| 8. | Mike Kirkland | CA |
| 9. | Ralph & Dolores Ricapito | PA |
| 10. | Elaine Newbill/Laurelle Pittman | FL |

TOP DIVISION MANAGERS



- | | Name | Location |
|----|-------------------------|-------------------------|
| 1. | Ruthann & Bob Morris | Chula Vista, California |
| 2. | Hildegard & Bill Fenske | Portland, Oregon |

TOP UNIT LEADERS



- | | Name | Location |
|----|----------------------|-----------------|
| 1. | Sue & Dave Hernandez | Carlton, Oregon |
| 2. | Ramona & Leon Steele | Tigard, Oregon |

CONGRATULATIONS TO OUR REACH OUT! PROMOTION DIAMOND AWARD WINNERS

2 Carat Diamond Award
for Promoting the Most Area Directors

Barbara & Gary Lazar

1 Carat Diamond Award
for Promoting the Most Unit Leaders

Lars Klaus Hardt

1/2 Carat Diamond Award
for Most Qualified Consultants

Millie & Billy Chron

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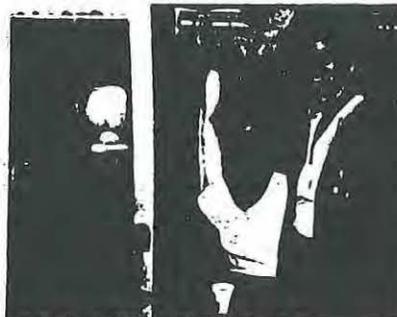
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& TRIUMPHS**We wish to extend our heartfelt thanks to our Task Force members**

To the Advertising/Visibility Team: Ruthann Morris, Loretta DeFeo, Hildegard Fenske, Betty Gray, Andrea Ileo, Kay Marovich, Paul Parker, Shirley Riesz, Dolores Ricapito and Julie Vivdli for the time and effort all of you put into the package of ideas you sent to us. We will begin to highlight your many useful ideas in the next issue of Breakthrough so that all of our Consultants can benefit from them.

To the Business Tools Team: Barbara Lazar, Alex Boswell and Laurelle Pittman for spearheading the efforts behind our Prospecting Flyer, Prospecting Brochure and Program Guide during a marathon weekend that was inter-twined with a sole source Retreat! Also, to Donna Dugan, Betty Gray, Janice Jones, Kay Marovich and Ruthann Morris for their support and input in developing our new sales support literature.



Leaders Ruthann Morris, Kay Marovich & Barbara Lazar come together at the San Diego Retreat with Paul & Betty Parker, Milan Hamilton and Linda Hevern, to brainstorm strategies for proactive media efforts.

JANICE JONES TAKES CAMBRIDGE FROM A RETREAT TO RADIO TO T.V.!

Good things happen to busy people and Janice has been among the busiest in recent weeks. In our new push to maximize our marketing efforts through Retreats, Janice scheduled several interviews and meetings for Dr. Nan Breizel prior to the recent Boston Retreat. These events included a presentation to the Wellness Department of Dynamics Research in the Boston area, and a one-half hour interview on a local morning radio talk show with a call-in format.

Nan's presentation focused on wellness and nutrition, covering topics such as cholesterol, body fat, maintenance, low-fat diets, and health. And what Janice Jones and Jan Cookson have done to follow up on these informative sessions deserves applause.

First, Dynamics Research,

a conservative corporate setting where they proposed a long-term program for employees. This program would include weekly support meetings, with each meeting covering a pre-selected topic on nutrition and wellness—i.e., the importance of exercise, cutting fat from your diet, lowering your cholesterol, etc. To participate in the program, an employee must be on the Cambridge Program. The cost is \$95 per person and will include a Starter Kit and a Control for Life tape set.

In a meeting with corporate executives, Cookson and Jones used the new full-color prospecting brochure plus a set of Control for Life tapes—a professional approach with professional pieces. They followed up immediately after Nan's presentation, listening

to their needs, and designed a program to fit their corporate culture.

The best time to prospect is when you have just come off a success and, Janice, aglow with success, has been prospecting the local media. After Nan's call-in radio appearance, Cookson and Jones approached the station with an idea about appearing weekly with nutrition facts. In negotiation is a three-month commitment beginning in January, a month many focus on health and weight management.

They also will be starting 4 station employees, including the show's host, on the Cambridge program.

Flush with this success, Janice was surprised when Channel 4 in Boston called (through her yellow-page ad) asking for information on the Cambridge Plan. Interested in doing a show over Thanksgiving, "Taking The Fat Out



Media stars Janice Jones & Sandy Nye

Of Your Diet", a 20-minute phone conversation landed Janice a taping session for local viewing! Janice included Sandy Nye, a rising star, who told her weight reduction story during the evening news.

Edited down to 5 minutes of actual air time, Janice and Sandy enjoyed the session, and after a few moments of jitters, felt comfortable and at ease talking about something they both deeply care about.

Congratulations, Janice, Jan & Sandy!

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CAMBRIDGE CUISINE

Cambridge is not just a liquid diet — it is a way of life. We are adding recipes galore to round out your Cambridge kitchen and here are a few that will be found in our upcoming cookbook. Share these recipes with your family and watch their health improve!

We all know that variety is the spice of life, but it is the spice that adds variety to this wonderful holiday favorite:

**FOOD FOR LIFE
PUMPKIN CHIFFON PIE**

- 1 cup cold water
- 1/2 cup boiling water
- 2 tbsp. Knox Unflavored Gelatin
- 2 to 6 scoops (recommended: 4 scoops) FFL Vanilla
- 1 cup cooked pumpkin (100 calories)
- 1/2 tsp. Pumpkin Pie Spice (if using extract, use 1/4 tsp.)
- 4 packages sweetener, or to taste
- 5 to 7 ice cubes
- 2 tbsp. Super Oats or Grapenuts

Sprinkle gelatin in 1/2 cup cold water. Set aside. In a blender, add 1/2 cup cold water, FFL Vanilla, Pumpkin Pie Spice, cooked pumpkin, and sweetener. Set aside. Add 1/2 cup boiling water to gelatin; stir until clear. Add gelatin to blender and blend on high. While blending, sprinkle Super Oats or Grapenuts in bottom of 9" pie pan. Add ice cubes to blender (while blending), one cube at a time. Continue to blend for 15 to 30 seconds. Pour mixture into pie pan and place in refrigerator for at least 15 minutes.

Who can resist a slice of

rich creamy cheesecake? Go ahead and sin a little! Try this unbelievably delicious treat without having to worry about all the calories cheesecake usually has!

**FOOD FOR LIFE
CHEESECAKE**

- 1 cup cold water
- 1/2 cup boiling water
- 1 1/2 tbsp. Knox Unflavored Gelatin
- 4 scoops FFL Vanilla
- 1/2 cup Ricotta low fat cheese
- 1/2 cup non-fat yogurt (195 calories)
- 2 tsp. Vanilla Extract
- 1/2 tsp. Lemon Extract
- 4 pkgs. sweetener
- 1 tbsp. lemon juice
- 1 tsp. grated lemon rind
- 5 ice cubes
- 2 tbsp. Grapenuts (90 calories)

Pour cold water into blender. Sprinkle gelatin over cold water. Set aside. Sprinkle Grapenuts in bottom of pie pan. Add boiling water to blender and stir until gelatin is dissolved. Add remaining ingredients to blender (except ice cubes) and blend until smooth. Add ice cubes and blend on high for 15 to 30 seconds. Gently pour mixture into 9" pie pan. Chill in refrigerator for at least 15 minutes.

Note: Pie is creamier if you let it set out for awhile before serving.



DELICIOUS AND NUTRITIOUS EGGNOG

Don't forget that your holiday guests deserve Cambridge, too!

Add all ingredients to a blender and mix.

HOT NOG

What better way to spread holiday cheer than with Cambridge Food For Life Eggnog! Make it by the punch bowl full. Serve it hot with cinnamon and rum flavoring on those cold winter nights. Warm up your guests with nutrition, not calories.

- 9 oz. hot water
- 1 scoop FFL Eggnog
- 1/2 capful Almond Extract
- 1/2 capful Butter Extract
- 1/2 capful Black Walnut Extract
- 1/2 capful Coconut Extract
- 1/2 capful Rum Extract
- 1 pkg. sweetener

EGGNOG DELIGHT

- 9 oz. hot water
- 1 scoop FFL Eggnog
- Pumpkin Spice
- 3/4 capful Rum Extract

Add all ingredients to a blender; mix until smooth.

Savor and enjoy these aromatic delights!

INSTANT SALES

Prospect like a pro by using the new Prospecting Flyer (Order #660667: \$7.20 for a package of 50)--Order in quantity! Special offer through January 15th--10 packages (500) for \$50.

Why 500? You need to test, test and test again! Always do a small market test to determine if an idea works for you. Test 5 ideas - 5 venues. Hand out or mail 100 flyers five different ways. For example:

* Take 100 to your local craft fairs. Mill around and hand them out. Your intro: "Would you be interested in a flyer concerning my business?"

* Take 100 to your local shopping center, small village square, strip shopping center. Place them on windshields, (or better yet, have your 12-year old do it!)

* Take 100 to a soccer game or football game, and hand out -- have 10 kids hand out 10 each.

* Take 100 to your local beauty salon or tanning parlor, and ask if you can leave them. Let them know that if you receive any sales from these, you will rebate them \$1 per can...Why not?

* Take 100 to your local day care center -- ask the Director if you can place these at the front desk, or better yet, put them in the kid's cubbies.

The bottom line is: be inventive. To really test out this marketing approach, mark the flyers, perhaps stamp each group with a different color.

Have a better idea? Let us know -- the best three ideas will be printed in the next issue of Breakthrough -- and the winners will receive 100 prospecting flyers FREE!

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Turning Your Dreams Into Reality-

BACK TO BASICS—MARKETING

It's marketing, all marketing. Once you have these basic concepts down, and become professional in your approach to marketing, the sales will take care of themselves. To make any program work, you need to understand three basic marketing secrets:

1. You must be committed to your marketing program.
2. You must think of your marketing program as an investment.
3. Your marketing program must be consistent.

Marketing is repetition. The more you do something, the better it will work. You need to stay with an idea and give it adequate opportunity to work. That's difficult, particularly when you haven't really thought out your marketing plan. That's where it starts. Your marketing plan. Take some time, think it through, and write it out...where you want to go, and how you are going to get there.

Second, recognize that your plan, your program, is an investment. A marketing program (which may include some advertising) should be perceived as a conservative investment. It is not a miracle cure. No ad, no seminar program, no single step, one-shot attempt at building your business will work. It's step-by-step, building-block-by-building-block to that success you seek.

Third, be consistent. Don't keep switching media or messages. Consistent repetition, getting the word out to the same people in the same way, is what works. Have you ever

seen a small ad, or received a flyer about a service or product, and totally disregarded it the first or even the second go-round? Then several weeks or months later—once you've had time to think about the ad, or your situation has changed, gone seeking out the original source? This is never more appropriate than when dealing with weight reduction. Don't disappoint your potential customers -- be there when they need you. If you're not in the phone book -- where are you? How often are you there? If you were looking for you, where would you find you?

Consistency = familiarity. Familiarity = sales.

People buy products they know, from people they know. Are you making it easy to know you and your business? Are you getting the word out, getting your name out? Donna

STEPPING OUT OF YOUR COMFORT ZONE

Donna Dugan did and she got rave reviews! "I'm not a good speaker and I'm not comfortable with it," states Donna, describing her recent seminar on Maintaining Your Weight.

Positioning yourself as credible and knowledgeable in your field is a step toward becoming truly professional. Dugan understands this and she is taking positive steps toward that end. Planning the seminar and putting it together was the difficult part. Then, delivering that first seminar. Now that she's accomplished this, she's ready to roll it out...again and again. Nine

Dugan is and it's working for her.

To turn your dreams or vision into reality, it takes an ACTION PLAN. Small steps, taken one at a time will get you to your destination. Over the next few issues, we'll discuss steps to get you to your goal. But let's start with your marketing plan. Ask yourself these questions:

1. What are my objectives?
2. What are the strengths and weaknesses of what I am offering— my services?
3. Who is my competition?
4. Who is my target market — and what are the needs of this market?
5. What business am I really in?
6. What is my goal?

Easy questions, right? But think through your answers and WRITE THEM DOWN. Remember to start with a purpose, e.g. to make \$1,000 each

people attended her first seminar, where Donna discussed food choices for life. She used slides and rubberized food samples to put across her points.

Dugan, who is now charging customers for support meetings, has begun to position herself in her community as a nutrition and weight management professional, which she truly is. Her new business cards, featuring her photo and designed as a fold-over card include bulleted points on Cambridge products and programs.

If you have a marketing idea or would like suggestions and guidance, call (800) 443-2584.

month — bottom line. Then move to what contributes to that bottom line — your target audience. Concentrate on a specific market (for example: brides or new mothers).

Now comes your positioning statement, which explains why Cambridge has value, and why anyone should buy it, and why they should buy it from you. Think this through. Then write down 10 reasons why anyone should buy it from you. Believe it, memorize it. If you believe it, you can sell it. Remember, selling is simply transferring your enthusiasm; that is, belief, not just in the product, but in yourself.

Next, include marketing tools you might use to achieve your goals. These tools include advertising, workshops for the public, word-of-mouth referrals (with referral incentives), demonstrations in homes or in the workplace, presentations to groups, personal letters, letters to businesses, testimonials, yellow page advertising, free seminars, sampling, publicity, etc. Bring your creativity and personalization into play.

Finally, decide how much your marketing plan will cost. What investment are you willing to make. To make it palatable, define the cost as a percentage of your projected sales. If, for example, your sales will be \$500 each month, allow 10% or \$50 for marketing. And, spend \$50 for marketing each month. Remember, be consistent.

Here are some basic marketing truths for you to remember:

1. The market changes constantly. Nothing is more fickle than the weight reducing public. The market is in a constant state of change. When

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you stop advertising or stop getting out your word, you miss this evolving change. **YOU MUST BE THERE TO PLAY!**

2. People forget fast. They are bombarded with literally thousands of messages daily — let's be honest, just how vital is your message in their life?

3. You may give up, and change, but your competition won't. People spend money on weight reduction programs, and if your message isn't out there, their money goes elsewhere.

4. Marketing strengthens your identity — and your credibility. If you stop putting out the word about Cambridge, people begin to lose confidence in you — and your

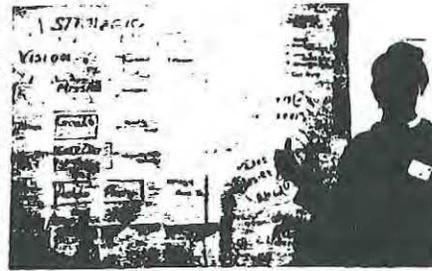
product.

5. Marketing is essential to growth. Unless you continue to put out the word, people will forget you.

6. Marketing builds loyalty with your existing customers. When they hear from you, or about you, they refer business. Referrals can be the lifeblood of your existence.

7. Marketing maintains morale. When you see your marketing work, or see your name and visible rewards from your efforts, it helps you maintain your level of effort.

8. Marketing gives you an advantage over your competitors who are not advertising. A small, well-placed 2-3 line classified ad in the same location each and every week can be more beneficial than a 3-



... from Vision, to Goal, to Action Plan. Executive Vice President Linda Hevern shared a system for turning dreams into reality at the recent Parker Retreat in San Diego!

times-per-year ad. If your ad is there when your prospect needs you, you win!

9. Marketing allows you and your business to keep your doors open. You have overhead — let marketing help

pay the bills.

10. If you don't market, you lose. Invest your money in marketing or lose it entirely.

It's your choice. (Next Issue: Let's talk tools — marketing tools and how to use them)

TARGET MARKETS YOU SHOULD AIM FOR...

Brides (the entire wedding party, including mother and mother-in-law)

Hint: For 5 weeks contact every bride-to-be listed in your Sunday newspaper. If you get an appointment or interested response from 10% of your contacts, pursue them!

New Mothers (Get your body back!)

Hint: For 5 weeks contact all new mothers listed in your weekly newspapers (all local papers). Approach them with the nutrition/health aspect as well. Cambridge products are a great supplement for nursing mothers. Call and try to get an appointment — be willing to go to them. That is the kind of customer service which appeals to this market. See if they can get 3 or 4 new mothers together — maybe their entire Lamaze class.

Flight Attendants

Hint: If you are near a major airport, contact 2 or 3 airlines and find out what it would cost to run a small classified ad in their in-house newspaper. Or, if there is a bulletin board for employees, post your flyers. Better yet, see if you can make a presentation to personnel in the employee lounge. (Use the New Presentation Brochure)

Class Reunions (After weddings, when are most women/

men inclined to reduce the most weight?)

Hint: Place a small classified ad in your local paper: Attending your 25th, (10th, 20th) Reunion? Look like you did 25 years ago. Do it now!

Sales Professionals

Hint: Realtors. Find out how much it costs to run a small classified ad in your local realtor newsletter. Inquire about making a presentation on health/nutrition in their local sales offices. Attend sales meetings for professional associations.

Fitness Trainers (What better person to get the word out for you!)

Hint: Approach them regarding fitness and nutrition. Include an incentive for making money.

NOTE: Other groups you should consider are teachers, nurses, temporary employees, aerobic instructors, runners, college students, models (there are modeling agencies in every major city and 8 out of 10 girls who call to inquire need to lose at least 10 pounds to model), singles groups. If you are specifically interested in targeting one particular group, call Customer Service at 1-800-443-2584 or Lynne Murphy at 804-739-2355 for guidance.

EXHIBIT G

On The Horizon

CAMBRIDGE RETREATS--TRAIN THE TRAINER IS IN FULL SWING!

For Retreats to be successful to your business they must be held often, giving the maximum number of people the special opportunity of experiencing the physical and spiritual benefits of sole source in an atmosphere of fun and support. In a relaxed and caring environment, you assess your eating habits, create a plan to change those habits, and receive valuable information on how your body reduces weight and what to eat and do to keep that weight off.

Each Retreat is a unique experience. The primary goal is to offer an enjoyable weekend where you can successfully begin or regain your commitment to a program which supports your health and well-being. We have found that each group has specific needs and have geared the Retreats accordingly. Happily, our Leaders and Consultants are now running with the Retreat concept, holding different types of Retreats in their areas.

We are here to support you in this endeavor. Retreat modules are being prepared to offer you support in the various subjects which are so well received in this weekend environment. Whether you focus on the behavior modification aspect, nutrition, the physiology of weight loss, changing your eating habits, or another area, you will find what works is the bonding and community spirit that evolves in this intimate encounter.

Whether it's for 6 or 60, a Retreat will work. Not only for your personal program and that of the attendees, but also for your business. Encourage each returning attendee to bring someone new--someone who has never been on a Cambridge program. What better way to be introduced to Cambridge than through a weekend Retreat!

You will leave the Retreat with:

- A positive sole source experience
- A structure for applying your experience to improve weight management success
- Inspiring and motivational techniques on goal setting for yourself or your business

We guarantee you'll return home with a plan!

Tuition includes lodging (double occupancy) and a CDS fee. Please call your area Retreat coordinator or Cambridge Direct Sales at 1-800-443-2584 (800-356-0082 from Chicago) for more information.

A very profound experience awaits you at a Retreat!

Spring '92 Schedule

The enthusiasm our Leaders and Consultants are showing for holding their own Retreats is wonderful! For example:

- Paul & Betty Parker look forward to hosting mini Retreats on an ongoing basis in the San Diego area. Attendees will have their choice of a weekend Retreat or a 5-day Retreat at a bay view home complete with a pool and spa--how luxurious!

- Barbara Lazar has already held two Retreats and plans to host one every other month beginning January 10-12.

- Alex Boswell and Shirley Riesz have both conducted Retreats in the Sarasota, Florida area!

- Janice Jones & Jan Cookson from Massachusetts, not to be outdone by the Far West or Southeast regions, will be holding their own Retreat starting early in the new year, as will MaryAnne Cosgrove and Marilyn McPhee.

- Sally Hennessey from New Jersey will add a new twist to her upcoming Retreats. Sally, who owns toning salons, will bring small groups into her salons for herbal wraps, toning, and sole source, for the ultimate in self-indulgence!

- In addition to these Retreats, the company will sponsor a Retreat for Donna Dugan in Houston on March 13-15, 1992. Attend and earn Continuing Education Units.

THE MARKETING PLAN

The suspension of the Rolling Quarter minimums policy announced in the September/October issue of Breakthrough is being continued indefinitely pending a thorough review, in progress, of the entire marketing plan. This change affects rank only; it does not affect the bonus structure. (Please refer to page 4 of the Sept/Oct Breakthrough for a full explanation.)

RENEWALS

It's time to renew! Renewal notices have been mailed to all Consultants and Leaders. Catch the excitement and mail in your renewal fee of \$20 today!

Every Consultant or Leader who renews by December 31, 1991 and places a personal order (order and renewal must be received no later than December 31, 1991) will receive exciting new Cambridge literature absolutely free. Place your order direct with Cambridge Direct Sales *now!*

All renewals postmarked after the deadline, January 15, 1992, will be assessed a \$10 late filing fee. Leaders who do not renew by January 31, 1992 will also forfeit their Leadership position as well as the benefits of being a Cambridge Consultant.

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Cambridge's Newest Consultant!

Meet Sandy Nye from Medfield, Massachusetts. Sandy attended the recent Retreat in Boston and this is what she has to say about Cambridge:

"I am healthy and in love with life, for the first time in my life", an emotional Sandy Nye told the group at the recent Boston Retreat. "All because of Cambridge."

"I've tried other diets, but couldn't lose weight. Nothing worked. My family told me I needed to lose weight, but it wasn't enough to make me do

it. Then Beverly Anderson told me about Cambridge."

Sandy admits one of her worst habits was chocolate milk. "I used to drink 3-4 glasses of chocolate milk every day, she says. "I switched to Cambridge Chocolate and sole sourced for 30 days. I never cheated. After that I switched to the regular program with 3 drinks and 400 calories, usually a frozen low-cal meal, for two weeks. Then sole sourced another 2 weeks. I lost 54 pounds."

At 5'3", 130 pounds, Sandy is a trim size 8 - down from a

size 16/18. "I didn't get discouraged. There were days it was hard, but I just kept going. Support is the biggest thing, and I had it in Cambridge."

Enthusied by the Boston Retreat and the wonderful new friends made over the weekend, Sandy was eager to join as a Consultant, where she can provide sup-



port and encouragement to others, making a difference in their lives.

WHY BECOME A CAMBRIDGE CONSULTANT?

The question we hear repeatedly is: Why become a Cambridge Consultant?

1. EARN MONEY

The first response and, perhaps, the most obvious is: Cambridge gives you the opportunity to earn money and create your own business goals and level of desired income. It means you are your own boss and can set your own working hours. So, one reason is you can **make money**.

2. BUILT-IN SUPPORT

If you have ever struggled with a weight problem you know the value of support. A more important reason to consider becoming a Cambridge Consultant is support. As a Consultant you are continually presenting the benefits of health and nutrition. You have built-in support to call upon when you personally need these extra encouragements to keep you going. As a Cambridge Consultant you make presentations to individuals and

groups. These presentations, as well as help build your business, keep you motivated to manage your weight and stay healthy. So, the second reason is **support**.

Why become a Cambridge Consultant?

- Earn Money
- Built-In Support
- Knowledge
- Friendships
- Results
- Fulfillment And Success

3. KNOWLEDGE

As a Cambridge Consultant you are eligible for training and publications offered by the company. These communications keep you on the leading edge in weight management research. Learning what's fact and what's fiction when it comes to managing weight has propelled many a dieter into the arms of success. So, the third

reason is **knowledge**.

4. FRIENDSHIPS

As a Cambridge Consultant you have opportunities to attend conferences and

meetings which teach you both business and personal development skills. And the opportunity to join in a network of weight management specialists committed to sharing information about health and nutrition. So, the fourth reason is **friendship**.

5. RESULTS

As a Cambridge Consul-

ant you give yourself the best opportunity to reach and maintain your ideal weight because you place yourself in a position to learn and teach what you need to remember most. Sharing what you know reinforces the changes you made in your personal habits and, therefore, keeps you on target. So, the fifth reason is **results**.

6. FULFILLMENT AND SUCCESS

As a Cambridge Consultant, you will reap...financial rewards, a healthy, trim body, and friendships that last a lifetime. Call us today to learn more about how you can become a Cambridge Consultant and make a significant impact on the world. You deserve **fulfillment**, and you deserve **success!**



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EXHIBIT G

Consultant's Corner

PROSPECTING TIPS...Here are prospecting tips # 15-25 from Lynne Murphy to help you jump-start your business.

15. **Two-for-one** — offer a two-for-the-price-of-one special. Get them started with a Fast Start Kit introductory offer. You double your business, and they will have a built-in PIP to keep them in their program
16. **Follow-up** — it's an art and a science. Go back through your files now and call those who have indicated an interest, but have not committed. Put together 4 or 5 and schedule a tasting. Run a special and get a commitment.
17. **Back to Basics** — schedule tastings. Set your goals and determine how many presentations you need to do each week to meet these goals. Write them down.
18. **Support** — it can make the difference. Put together some new support groups. Give those people a call who have gone off track — let them know they're not alone, and that you are starting some support groups.
19. **Recipes** — call your people and share some of our new recipes. Whether they're on Fast Start, a longer sole source program or the regular program, new recipes will add spice to their lives!
20. **Have a buffet!** That's right — get your group together and have a buffet. At the July Orlando Retreat, the highlight of the weekend was the sole source buffet on Saturday night. Twelve different samplings of Cambridge recipes were available, and displayed as beautifully and graciously as any banquet! Great fun and great tastes — for more info on this, call Lynne Murphy (804) 739-2355.
21. **Take Control** — Control For Life, that is. This effective behavior modification program is terrific. Make it available to your customers — have a support meeting where you listen to part of this program — discuss it, then sell it! It's Dr. Nan at her finest! This program is tops!
22. **Customer Survey** — everybody's doing it! Jump on the bandwagon. Do it by phone or mail — find out what will help them, what they like, what they don't like. Guidelines are available on this. Most important is to do something with the information you uncover.
23. **Reprints** — use them. Find 3 or 4 good reprints from your files or call your Leader. Make 50 copies and send them out — then follow up. Do that every month and you'll be amazed at the interest that is generated.
24. **Branch Out** — CDS phone tree spreads the word! Be sure to participate in our telephone tree and see how effective this one-on-one method of communication can be. Don't miss out on up-to-date information.
25. **Customer Phone Tree** — Why not try it out on customers? Try a customer phone tree. Do it regularly — with a new recipe, a new success story, an upcoming Retreat — Give it a try!

COMPLIMENTS & COMMENTS

- No MSG (monosodium glutamate)! The Cambridge products contain calcium sodium caseinate but it is not hydrolyzed (broken down into smaller particles) which forms MSG. In an ingredient listing, MSG would be listed as hydrolyzed vegetable protein or hydrolyzed protein.
- In order to provide adequate planning and production time for Breakthrough, we are returning to a bi-monthly schedule. Your input is important to ensure Breakthrough contains information that is helpful and supports your Cambridge business. Please share your comments with us. Help us make your newsletter the best it can be.
- Please note that when you charge your order to a credit card, your statement will show Dean Distributors as the vendor instead of Cambridge.
- We will be closed Tuesday, December 24th; Wednesday December 25th; and Wednesday, January 1st.
- Minimum individual orders...effective January 1, 1992, the minimum individual product order will be increased from \$50 to a minimum of one case of product or bars, plus \$4 shipping charge. (There is no minimum on separate purchases of literature, however, the shipping charge of \$4 is applicable.)
- The "sale explosion" of the year expires December 31, 1991. Offered at prices of up to 60% off are gift items sold during the past year as Thank You gifts (refer to past issues of Breakthrough). Please contact your upline Leader or call us direct for more information.
- Pumpkin Spice Flavoring has been a holiday favorite this season. Be sure to include it in your next order. First time users should be advised that it is very concentrated and should be added sparingly (a couple drops) to their Cambridge drink.

Published by: Cambridge Direct Sales
2801 Salinas Hwy., Bldg. F, Monterey, CA 93940-6420
800-443-2584

Complaint

EXHIBIT H

EXHIBIT H

MEDIBASE CAMERA-READY ART ADAPTABLE FOR NEWSPAPER AND MAGAZINE ADVERTISING

**If You Have
Weight-Related
Health Problems
And Must Lose Weight...**

**...There Is A
Medically Directed
Program For You**

- ◆ Physician supervised
- ◆ Professionally directed nutrition education
- ◆ Group support with weekly meetings
- ◆ Nutritionally complete, excellent tasting MedlBase[®] meal replacement
- ◆ Proven safe and effective in University testing

For more information call:

THESE ADS ARE FOR REPRODUCTION - DO NOT FOLD

**If You Have
Weight-Related
Health Problems
And Must Lose Weight...**

**...There Is A
Medically Directed
Program For You**

- ◆ Physician supervised
- ◆ Professionally directed nutrition education
- ◆ Group support with weekly meetings
- ◆ Nutritionally complete, excellent tasting MedlBase[®] meal replacement
- ◆ Proven safe and effective in University testing

For more information call:

These ads may be enlarged or reduced to fit the various specifications on your newspaper and/or magazine.

Be sure to contact your local newspaper or magazine for instructions on including your phone number and/or name in the area indicated at the bottom of the ad.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Dean Distributors, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its offices and principal place of business located at 1350 Bayshore Hwy., Suite 400, Burlingame, California. Advanced Health Care Systems, an operating division of Dean Distributors doing business as Cambridge Direct Sales and MediBase, has its offices and principal place of business at 2801 Salinas Hwy., Building F, Monterey, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

A. For purposes of this order, "*competent and reliable scientific evidence*" shall mean those tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

B. "*Weight loss program*," or "*diet program*," shall mean any program designed to aid consumers in weight loss or weight maintenance; including, but not limited to, the "Food for Life Weight Management System," which includes the "Cambridge Diet Plan," the "Food for Life" weight loss programs, the "Maintain for Life" weight maintenance program; the "MediBase" medically-monitored weight management program; and related weight loss and weight maintenance programs and related food products and/or nutritional products.

C. "*Very low calorie diet*," or "*VLCD*," shall mean any dietary regimen that provides 800 calories or less per day.

D. "*Distributor*" shall mean any purchaser or other transferee of any weight loss product or program who acquires or has acquired, with or without valuable consideration, said product or program and who is or has been engaged in the resale of said product or program to other distributors or to end-use consumers. "Distributor" shall include, but is not limited to, any "counselor," "unit leader," "division manager," "area distributor," "circle of champions" member and all other providers of respondent's weight loss programs.

E. For any order-required disclosure in print media that is disseminated, either directly from respondent, or indirectly through respondent's distributors, to be made "clearly and prominently," or in a "clear and prominent manner," it must be given both in the same type style and in: (1) twelve (12) point type where the representation that triggers the disclosure is given in twelve (12) point or larger type; or (2) the same type size as the representation that triggers the disclosure where the representation is given in a type size smaller than twelve (12) point type.

F. For any order-required disclosure given orally in a broadcast medium to be made "clearly and prominently," or in a "clear and prominent manner," the disclosure must be given at the same volume

and in the same cadence as the representation that triggers the disclosure.

I.

It is ordered, That respondent Dean Distributors, Inc., a California corporation, its successors and assigns, officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, or sale of any weight loss program in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Making any representation, directly or by implication, regarding the safety of respondent's very-low-calorie diet ("VLCD") programs unless respondent clearly and prominently discloses in close proximity to any such representation that physician monitoring is required to minimize the potential for health risks, or otherwise misrepresenting any health risk of any weight loss program.

B. Failing to provide to end-use consumers documents prepared for physicians that clearly and prominently disclose the health risks and complications that have been associated with very-low-calorie diets, including but not limited to the fact that VLCDs have been associated through published clinical studies with an increased risk of developing gallstones.

C. Misrepresenting the likelihood that participants of respondent's diet program(s) will regain all or any portion of lost weight.

D. Using any advertisement containing an endorsement or testimonial about weight loss or weight-loss maintenance success by a customer or customers of respondent's weight loss programs if the weight loss or weight-loss maintenance success depicted in the advertisement is not representative of what customers of respondent's weight loss programs generally achieve, unless respondent discloses, clearly and prominently, and in close proximity to the endorser's statement of his or her weight loss or weight-loss maintenance success the following statement:

"Results not typical."

Provided that if the endorsements or testimonials covered by this paragraph are in a broadcast medium, the disclosure required by this

paragraph must be communicated in a clear and prominent manner and in immediate conjunction with the representation that triggers the disclosure;

E. Making any representation, directly or by implication, about the success of customers on any diet program in achieving or maintaining weight loss or weight control unless, at the time of making any such representation, respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific evidence substantiating the representation; provided, further, that for any representation that:

1) Any weight loss achieved or maintained through any diet program is typical or representative of all or any subset of customers using the program, said evidence shall, at a minimum, be based on a representative sample of:

(a) All customers who have entered the program, where the representation relates to such persons; provided, however, that the required sample may exclude those customers who dropped out of the program within two weeks of their entrance or who were unable to complete the program due to illness, pregnancy, or change of residence; or

(b) All customers who have completed a particular phase of the program or the entire program, where the representation only relates to such persons;

2) Any weight loss is maintained long-term, said evidence shall, at a minimum, be based upon the experience of customers who were followed for a period of at least two years after completion of respondent's program (including any periods of participation in active maintenance); and

3) Any weight loss is maintained permanently, said evidence shall, at a minimum, be based upon the experience of customers who were followed for a period of time after completing the program that is either: (a) generally recognized by experts in the field of treating obesity as being of sufficient length to constitute a reasonable basis for predicting that weight loss will be permanent; or (b) demonstrated by competent and reliable survey evidence as being of sufficient duration to permit such a prediction.

F. Representing, directly or by implication, that any customers of any diet program have successfully maintained weight loss, unless respondent discloses, clearly and prominently, and in close proximity to such representation, the following information:

(1) The average percentage of weight loss maintained by those customers;

(2) The duration, over which the weight loss was maintained, measured from the date that customers ended the active weight loss phase of the program,

provided, however, that if any portion of the time period covered includes participation in respondent's maintenance program(s) that follows active weight loss, such fact must also be disclosed;

(3) The statement: "[respondent] makes no claim that this [these] result[s] is [are] representative of all customers in the [respondent's diet] programs;" and

provided, however, that if the customer population referred to is representative of the general customer population for that program, respondent is not required to make this statement;

(4) The statement: "For many dieters, weight loss is temporary,"

provided, however, that respondent shall not represent, directly or by implication, that this statement does not apply to dieters in respondent's programs.

G. Misrepresenting, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or survey; the rate or speed at which any participant in any weight loss program has experienced or will experience weight loss; or the performance, efficacy, safety, or benefits of any weight loss program or weight loss product.

H. Representing, directly or by implication, that prospective participants in respondent's weight loss programs will reach a specified weight within a specified time period, unless at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence substantiating the representation.

II.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation(s), the creation or dissolution of subsidiaries, or any other change in the corporation(s) that may affect compliance obligations arising out of this order.

III.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondent, or its successors or assigns, shall maintain and upon request make available to the Federal Trade Commission staff for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question any such claim or representation, or the basis relied upon for such representation, including complaints from consumers.

IV.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its officers, agents, representatives, independent contractors, and employees, that, directly or through any other corporation, subsidiary, division, or any other device, are engaged in the preparation and placement of advertisements or promotional materials, who communicate with customers or prospective customers, or who have any responsibilities with respect to the subject matter of this order. Respondent shall also distribute a copy of this order to all future officers, agents, representatives, independent contractors, and employees for a period of ten (10) years from the date of entry of this order. This paragraph shall not apply to distributors, who are addressed in paragraph V.

V.

It is further ordered, That:

A. Respondent shall distribute, within thirty (30) days after service of this order, a copy of this order to, and obtain a signed and dated acknowledgment of receipt thereof from, each distributor who has acquired at least 300 cans of respondent's product in any one year;

B. Respondent shall distribute a copy of this order to each future distributor who acquires at least 25 cans of respondent's product in any one month within thirty (30) days of the month in which that individual or entity acquires those cans, and shall obtain a signed and dated acknowledgment of receipt thereof;

C. Respondent shall institute a reasonable program of surveillance adequate to reveal whether any of respondent's distributors are engaging in acts or practices prohibited by this order;

D. Respondent further shall (1) take reasonable steps to notify promptly any distributor that respondent determines is failing materially or repeatedly to comply with any order provision; (2) provide the Federal Trade Commission with the name and address of the distributor and the nature of the noncompliance if the distributor fails to comply promptly with the relevant order provision after being so notified; and (3) in cases where that distributor has been notified as required by subparagraph V.D.(1) and continues conduct that constitutes a material or repeated violation of the order, terminate the distributor, as permitted by applicable state law; and

E. Respondent shall retain and make available to the Commission upon request the originals of the signed and dated acknowledgments required under subparagraphs V.A and V.B.

VI.

It is further ordered, That this order will terminate on June 16, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any paragraph in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

VII.

It is further ordered, That respondent and its successors or assigns shall, within sixty (60) days after service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Complaint

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IN THE MATTER OF

AUTODESK, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3756. Complaint, June 18, 1997--Decision, June 18, 1997

This consent order permitted Autodesk's acquisition of Softdesk, requires Softdesk to divest its own computer-aided design ("CAD") software engines, "IntelliCADD," to Boomerang Technology, Inc., and prohibits, among other things, the combined firm from reacquiring the IntelliCADD product or any entity that owns or controls it, without prior notice to the Commission, for a 10-year period. In addition, the consent order prohibits Autodesk from interfering with Boomerang's ability to recruit or hire Softdesk employees who worked on the development of IntelliCADD

Appearances

For the Commission: *Daniel Ducore.*

For the respondents: *Charles T. Compton and Neil Nathanson, Wilson, Sonsini, Rosati & Goodrich, Palo Alto, CA. and John Christie and Scott E. Pueschel, Hale & Dorr, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Autodesk, Inc. ("Autodesk") entered into an Agreement and Plan of Merger with Softdesk, Inc. ("Softdesk"), whereby Autodesk agreed to acquire all of the outstanding shares of Softdesk, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such acquisition, if consummated, would have violated Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

A. THE RESPONDENTS

1. Respondent Autodesk, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the

State of Delaware, with its office and principal place of business located at 111 McInnis Parkway, San Rafael, California.

2. Respondent Softdesk, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 7 Liberty Hill Road, Henniker, New Hampshire.

3. At all times relevant herein, respondents Autodesk and Softdesk have been and are now engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, 15 U.S.C. 12, and are corporations whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

B. THE PROPOSED ACQUISITION

4. In December 1996, Autodesk and Softdesk entered into an Agreement and Plan of Reorganization whereby Autodesk would acquire 100% of the voting securities of Softdesk in exchange for shares of Autodesk common stock with a value of \$90 million (the "Acquisition").

5. Autodesk is a public company that develops and markets computer-aided design ("CAD") software for the architecture, engineering and construction (the "AEC") industries. Autodesk offers a portfolio of software products including a CAD engine marketed and sold under the name "AutoCAD," for use with Windows operating systems on personal computers. Autodesk has had annual sales in excess of \$530 million.

6. Softdesk is a public company that also develops and markets CAD software for the AEC market. Softdesk has had annual sales in excess of \$40 million. Softdesk offers a portfolio of applications software that are used in conjunction with and to supplement CAD engines, primarily Autodesk's AutoCAD. Softdesk was also developing a CAD engine, known as "IntelliCADD."

C. RELEVANT MARKET

7. One relevant line of commerce within which to analyze the effects of Autodesk's acquisition of Softdesk is the market for CAD engines for Windows-based personal computers.

8. CAD engines are used by professional engineers to design and draw structures or other building projects for a variety of industries. CAD engines are the software platform which allows draftsmen to

draw lines, shapes, and objects with their computer. CAD engines can be a stand-alone product or used in conjunction with application software that enhances and increases the capabilities of the CAD system.

9. Customers using Windows-based CAD engines would not be likely to switch to UNIX-based CAD systems even if the price of Windows-based CAD engines increased substantially. Professional engineers at one time used CAD engines designed for use on UNIX-based mainframe computers. With the increase in the power of personal computers and their decline in price, engineers now principally use Windows-based CAD engines. Unix-based CAD software is still in use today, but is primarily limited to use in highly technical and sophisticated projects involving three-dimensional rendering of drawings. UNIX-based CAD software, and the hardware necessary to operate it is substantially more costly than Windows-based CAD software and hardware.

10. The relevant geographic market within which to analyze the effects of Autodesk's acquisition of Softdesk is either the United States or the world. While software is easily transported, there are no significant imports into the United States of Windows-based CAD engines.

D. MARKET STRUCTURE

11. The relevant market for Windows-based CAD engines is highly concentrated. Autodesk commands a dominant market share of the Windows-based CAD engines in North America, controlling nearly 70% of the installed base with approximately 1.4 million seats.

12. Among CAD engines in the marketplace for use on Windows-based personal computers, Autodesk's AutoCAD product is viewed by many in the industry as the de facto standard for Windows-based CAD systems. There are other CAD engines available in the market for use on personal computers, with varying degrees of file compatibility and transferability with AutoCAD, which is necessary to be an effective competitor in this market.

E. CONDITIONS OF ENTRY

13. *De novo* entry or fringe expansion into the relevant market would require an expenditure of substantial sunk costs and would be time-consuming and, therefore, such entry is not likely.

14. Entry sufficient to deter or defeat reductions in competition resulting from Autodesk's acquisition of Softdesk's IntelliCAD product requires developing a CAD engine that offers file compatibility and transferability with AutoCAD. The large installed base of AutoCAD users necessitates that any new CAD engine developed and offered in the market offer file compatibility and transferability to AutoCAD in order to gain sales. Users of AutoCAD have a large number of drawings in the AutoCAD format. Moreover, many users must share files they create with others who must be able to read and edit those files using their CAD software. Since most engineers use AutoCAD any alternative CAD engine must have the capability to read and be compatible with AutoCAD files without losing substantial amounts of data or information.

F. SOFTDESK'S ENTRY INTO THE CAD ENGINE MARKET

15. Softdesk, although historically a developer and seller of CAD application software, was developing and had tested a CAD engine, referred to as "IntelliCADD," for use on Windows-based personal computers. IntelliCADD provides file transferability and compatibility with Autodesk's AutoCAD generated files and application software. The IntelliCADD product is a direct competitor to and substitute and replacement for AutoCAD.

16. Softdesk had developed the IntelliCADD product for more than two years and was testing its IntelliCADD product with customers until sometime prior to the proposed merger with Autodesk. In approximately June 1996, Softdesk determined that it no longer had the financial ability to support continued development and marketing of the IntelliCADD product. The head of the team that had developed the product proposed to purchase the technology and formed Boomerang Technology, Inc. ("Boomerang") for the purpose of acquiring the product, completing its development, and bringing the product to market. Boomerang negotiated with Softdesk for the purchase of the IntelliCADD product and exchanged draft purchase agreements with Softdesk. Softdesk, however, terminated those negotiations at around the time that Autodesk agreed to acquire Softdesk. Softdesk representatives previously told Boomerang that Softdesk would sell the IntelliCADD product to Boomerang if Softdesk were purchased by someone other than Autodesk, but would not sell it to Boomerang if Softdesk were purchased by Autodesk.

17. After being advised by Commission staff that Autodesk's acquisition of Softdesk raised competitive concerns in the market for personal computer-based CAD engines, Softdesk resumed negotiations with Boomerang and divested and sold all of its rights in the IntelliCADD product to Boomerang pursuant to a Technology Transfer Agreement dated February 21, 1997. On that same date, Boomerang assigned and sold all of its rights to the IntelliCADD product to Visio Corporation.

18. Softdesk's development of the IntelliCADD product provided the market with a potential CAD engine that offered file compatibility and transferability with AutoCAD, thus providing direct head-to-head competition to AutoCAD.

19. Customers who had tested the IntelliCADD product reacted favorably to it. Some customers delayed or postponed the purchase of AutoCAD in anticipation of IntelliCADD being made available in the market. By the time Autodesk agreed to acquire Softdesk, the IntelliCADD product was within months of being introduced in the market.

G. EFFECTS OF THE PROPOSED ACQUISITION

20. The acquisition by Autodesk of Softdesk's IntelliCADD product would have substantially lessened competition in the market for Windows-based CAD engines by, among other things:

- a. Eliminating substantial, direct head-to-head competition between Autodesk and Softdesk;
- b. Eliminating actual potential competition from Softdesk in the relevant market;
- c. Preserving and maintaining Autodesk's market power;
- d. Substantially increasing the risk of unilateral exercise of market power;
- e. Maintaining high prices, or preventing the lowering of prices, for Windows-based CAD engines; and
- f. Reducing service to customers of Windows-based CAD engines.

H. VIOLATIONS CHARGED

21. The agreement described in paragraph four violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

22. The acquisition of Softdesk's IntelliCADD product by Autodesk, if consummated, would have violated Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

APPENDIX I

INTERIM AGREEMENT

This Interim Agreement is by and between Autodesk, Inc., a corporation organized and existing under the laws of the State of Delaware ("Autodesk"), Softdesk, Inc., a corporation organized and existing under the laws of the State of Delaware ("Softdesk"), and the Federal Trade Commission, an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (the "Commission").

PREMISES

Whereas, Autodesk has proposed to acquire all of the voting securities of Softdesk pursuant to the Agreement and Plan of Reorganization by and among Autodesk, Inc., Autodesk Acquisition Corporation and Softdesk, Inc., dated December 10, 1996 ("the proposed Acquisition");

Whereas, the Commission is now investigating the proposed Acquisition to determine if it would violate any of the statutes the Commission enforces; and

Whereas, if the Commission accepts the Agreement Containing Consent Order ("Consent Agreement"), the Commission will place it on the public record for a period of at least sixty (60) days and subsequently may either withdraw such acceptance or issue and serve its complaint and decision in disposition of the proceeding pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached during the period prior to the final issuance of the Consent Agreement by the Commission (after the 60-day public notice period), there may be interim competitive harm; and

Whereas, the entering into this Interim Agreement by Autodesk and Softdesk shall in no way be construed as an admission by Autodesk and Softdesk that the proposed Acquisition constitutes a violation of any statute; and

Whereas, Autodesk and Softdesk understand that no act or transaction contemplated by this Interim Agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Interim Agreement.

Now, therefore, Autodesk and Softdesk agree, upon the understanding that the Commission has not yet determined whether the proposed Acquisition will be challenged, and in consideration of the Commission's agreement that, at the time it accepts the Consent Agreement for public comment, it will grant early termination of the Hart-Scott-Rodino waiting period, as follows:

1. Autodesk and Softdesk agree to execute the Consent Agreement and be bound by the terms of the order contained in the Consent Agreement, as if it were final, from the date Autodesk and Softdesk sign the Consent Agreement.

2. Autodesk and Softdesk agree that, from the date Autodesk and Softdesk sign the Consent Agreement until the first of the dates listed in subparagraphs 2.a and 2.b, they will comply with the provisions of this Interim Agreement:

a. Ten (10) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The date the order is final.

3. Autodesk and Softdesk waive all rights to contest the validity of this Interim Agreement.

4. For the purpose of determining or securing compliance with this Interim Agreement, subject to any legally recognized privilege, and upon written request, and on reasonable notice, Autodesk and Softdesk shall permit any duly authorized representative or representatives of the Commission:

a. Access, during the office hours of Autodesk and Softdesk and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Autodesk and Softdesk relating to compliance with this Interim Agreement; and

b. Upon five (5) days' notice to Autodesk and Softdesk and without restraint or interference from them, to interview officers,

directors, or employees of Autodesk and Softdesk who may have counsel present, regarding any such matters.

5. This Interim Agreement shall not be binding until accepted by the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed merger of Autodesk, Inc. ("Autodesk"), and Softdesk, Inc. ("Softdesk"), and it now appearing that Autodesk and Softdesk, hereinafter sometimes referred to as the "respondents," are willing to enter into an agreement containing an order to refrain from certain acts and providing for other relief, and respondents having been furnished with a copy of a draft complaint that the Bureau of Competition has presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Clayton Act and Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission, having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect; and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, makes the following jurisdictional findings and enters the following order:

A. Respondent Autodesk, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 111 McInnis Parkway, San Rafael, California.

B. Respondent Softdesk, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 7 Liberty Hill Road, Henniker, New Hampshire.

C. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*Respondent Autodesk*" or "*Autodesk*" means Autodesk, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries (including, after the Acquisition, Softdesk, Inc.), divisions, groups and affiliates controlled by Autodesk, Inc., and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

B. "*Respondent Softdesk*" or "*Softdesk*" means Softdesk, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Softdesk, Inc., and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

C. "*Boomerang*" means Boomerang Technology, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 241 Kalbaugh Street, Ramona, California.

D. The "*Acquisition*" means the purchase of Softdesk by Autodesk pursuant to the Agreement and Plan of Reorganization by and among Autodesk, Inc., Autodesk Acquisition Corporation and Softdesk, Inc., dated December 10, 1996.

E. "*Respondents*" means Autodesk and Softdesk.

F. "*Commission*" means the Federal Trade Commission.

G. "*IntelliCADD Products*" means the IntelliCADD software product and all technical system documentation and user

documentation relating thereto identified as the "Acquired Assets" in the Technology Transfer Agreement entered into between Softdesk and Boomerang dated February 21, 1997.

H. "*Documentation*" means all supporting documentation associated with the IntelliCADD Products provided by Softdesk identified in the Technology Transfer Agreement entered into between Softdesk and Boomerang dated February 21, 1997.

II.

It is further ordered, That respondents shall take no action to interfere with the ability of Boomerang to recruit or employ respondents' employees whose primary responsibility at respondents was the development and/or programming of the IntelliCADD Products.

III.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall not, without prior notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

- A. Acquire the IntelliCADD Products;
- B. Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, that owns, controls or otherwise has an interest in the IntelliCADD Products.

IV.

It is further ordered, That the prior notification required by paragraph III of this order shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such

transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, respondents shall not consummate the transaction until twenty (20) days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

Provided, however, that prior notification shall not be required by paragraph III of this order for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

V.

It is further ordered, That one (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with paragraphs II and III of this order.

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and reasonable notice, respondents shall permit any duly authorized representative of the Commission:

A. Access, during normal office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondents relating to any matters contained in this order; and

B. Upon five (5) days' notice to the respondents, and without restraint or interference, to interview officers, directors, or employees of the respondents, who may have counsel present.

VII.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporations that may affect compliance obligations arising out of this order.

VIII.

It is further ordered, That this order shall terminate on June 18, 2007.

IN THE MATTER OF

COOPERATIVE COMPUTING, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3757. Complaint, June 20, 1997--Decision, June 20, 1997

This consent order requires Cooperative Computing, Inc., among other things, to divest its electronic parts catalog to MacDonald Computer Systems through an exclusive, royalty-free and perpetual license with the right to sublicense and to transfer or assign its PartFinder[®] electronic catalog database, its J-CON[®] application program interface, and support software and documentation.

Appearances

For the Commission: *Daniel Ducore.*

For the respondent: *Thomas A. Roberts and Debra J. Pearlstein, Weil, Gotshal & Manges, New York, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Cooperative Computing, Inc. ("CCI") has entered into an Agreement and Plan of Merger with Triad Systems Corporation ("Triad"), whereby CCI has agreed to acquire all of the outstanding shares of Triad and that CCI has commenced a tender offer for the outstanding shares of Triad, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

A. THE RESPONDENT

1. Respondent Cooperative Computing, Inc. ("CCI") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas with its office and principal place of business located at 6207 Bee Cave Road, Austin, Texas.

2. At all times relevant herein, respondent has been and is now engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

B. THE PROPOSED ACQUISITION

3. In October 1996, CCI entered into a merger agreement with Triad Systems Corporation ("Triad") and announced its intention to commence a tender offer for all of the outstanding voting securities of Triad. Under the terms of the tender offer, Triad shareholders will receive \$9.25 per share, or a total of approximately \$181 million. Immediately prior to the CCI acquisition of Triad, Hicks, Muse, Tate & Furst ("Hicks Muse"), a private investment firm based in Dallas, Texas, will acquire over 50 percent of CCI stock and gain control of CCI.

4. CCI is a privately-held company that develops and markets management information system software for the automotive aftermarket. CCI offers a portfolio of software products that assist auto parts distributors and retailers to track their parts inventory. CCI has developed and markets with its software a proprietary database of auto parts for domestic and foreign automobiles. CCI has had annual sales of approximately \$43 million.

5. Triad, a publicly-held Livermore, California-based company, develops and markets management information system software for the automotive aftermarket and for the hardlines and lumber industries. Triad has had annual sales of approximately \$175 million, including approximately \$90 million attributable to sales to the automotive parts aftermarket. Triad offers a portfolio of applications software that allows automotive parts distributors and retailers to efficiently manage their businesses. Triad also develops and sells a proprietary database of auto parts for domestic and foreign automobiles.

C. RELEVANT LINES OF COMMERCE

6. Warehouse distributors and jobbers are businesses that distribute and sell automotive parts and accessories into the replacement market, known as the automotive aftermarket. Warehouse distributors are large automotive aftermarket wholesalers and distributors of automotive parts and accessories. A warehouse

distributor typically purchases automotive parts directly from manufacturers, carries an inventory of tens of thousands of parts, and distributes those parts to jobbers. Jobbers are generally smaller distributors of automotive aftermarket parts and accessories which purchase parts from warehouse distributors. A jobber typically carries an inventory of a few thousand automotive parts and distributes those parts to professional automotive repair service dealers. The functions of traditional warehouse distributors and jobbers are today sometimes combined in what are known as two-step distributors, which are automotive aftermarket distributors who purchase automotive parts and accessories directly from manufacturers and sell those parts directly to automotive repair service dealers.

7. A management information system or "MIS" system is a computer system, including software, and sometimes including hardware, used by warehouse distributors and jobbers to manage their business including managing the inventory of the millions of aftermarket automotive parts manufactured for domestic and foreign-built automobiles. An MIS system performs many functions including inventory control, point-of-sale purchase ordering, accounts receivable, accounts payable, payroll, and general ledger, and aids the warehouse distributor or jobber in managing the business.

8. An electronic automotive parts catalog or "electronic catalog" is a database of aftermarket automotive part numbers that is searchable by make, model and year of car. An electronic catalog quickly and efficiently determines, with make, model and year of automobile information, which automotive part number, and hence, which automotive part is needed for a particular automobile. An electronic catalog is a very extensive database, containing millions of part numbers for domestic and foreign cars.

9. One relevant line of commerce within which to analyze the effects of CCI's acquisition of Triad is the market for electronic catalogs. There are no economic substitutes for electronic catalogs. Paper catalogs, the only possible substitute for an electronic catalog, are inadequate substitutes because paper catalogs are cumbersome and time consuming to use. The ability of warehouse distributors and jobbers to access information about parts availability and supply the required product is critical to their success, since the industry standard for same day repair service causes service dealers to require delivery of needed parts within 30 minutes. Electronic catalogs are sold as stand-alone products and as parts of integrated MIS systems.

10. Another relevant line of commerce within which to analyze the effects of CCI's acquisition of Triad is the market for MIS systems integrated with an electronic catalog. An MIS integrated with an electronic catalog enables users to access the vast inventory of automotive part numbers of hundreds of automotive part manufacturers on the same computer terminal as the MIS. Customers often demand an MIS integrated with an electronic catalog to be able to electronically transfer automotive parts data from the electronic catalog to a purchase order in the MIS. This transfer of data is important because it saves time and eliminates any risk of human error during the process of rekeying automotive part numbers into purchase orders.

11. The relevant geographic market within which to analyze the effects of CCI's acquisition of Triad is either the United States or North America. Many automotive parts and part numbers are unique to the United States and Canada. While software is easily transported, there are no imports into the United States of either electronic catalogs or integrated MIS systems with electronic catalogs.

D. CONCENTRATION

12. The relevant U.S. or North American markets for electronic catalogs and for MIS systems integrated with an electronic catalog are highly concentrated.

13. There are only a limited number of providers of electronic catalogs. In addition to CCI and Triad, there is only one other firm, Profit-Pro, Inc. ("Profit-Pro"), which develops and sells an electronic catalog for the independent automotive aftermarket. Triad sells both a stand-alone catalog and a catalog integrated with an MIS system, while CCI only sells its catalog integrated with an MIS system. CCI and Triad are, nonetheless, substantial, direct competitors. The electronic catalog offered by Profit Pro, Inc. is considered inferior compared to the CCI and Triad catalogs, in the size of its database, the accuracy of the part numbers in the database, and the speed with which it is updated. Profit-Pro is a weak, fringe competitor with a small market share.

14. One closed automotive aftermarket distribution network and one large automotive aftermarket retail chain of stores have their own, internally developed electronic catalog. These two electronic catalogs are not available to the independent automotive aftermarket. Moreover, these two electronic catalogs are designed to meet the

specific needs of those firms and therefore they have a very limited database of automotive parts compared to the electronic catalogs of CCI and Triad. Therefore, these two catalogs do not constrain the pricing of electronic catalogs by CCI or Triad.

15. Triad and CCI are the dominant providers of MIS systems integrated with an electronic catalog, together controlling approximately 70% of the market. The merger of CCI and Triad would increase the Herfindahl-Hirschmann Index ("HHI") over 1200 points to over 3900. Aside from CCI and Triad, all other firms selling a MIS integrated with an electronic catalog rely upon Triad or Profit-Pro for their electronic catalog. These fringe firms do not constrain pricing nor in any other way substantially impact competition for the development and sale of MIS systems integrated with an electronic catalog.

E. CONDITIONS OF ENTRY

16. *De novo* entry or fringe expansion into the relevant markets which would be sufficient to deter or defeat reductions in competition resulting from the CCI acquisition of Triad would not be timely or likely. Developing an electronic catalog would require an expenditure of substantial sunk costs and would be time-consuming. Electronic catalog data must be entered manually into a database because the electronic parts data is received in a different format from each of hundreds of automotive parts manufacturers. Entry with a catalog covering only a fraction of available automotive parts would not be acceptable to most warehouse distributors and jobbers.

F. EFFECTS OF THE PROPOSED ACQUISITION

17. The proposed acquisition by CCI of Triad may substantially lessen competition in the United States or North American markets for electronic catalogs and for MIS systems integrated with an electronic catalog by, among other things:

- a. Increasing concentration substantially in highly concentrated markets;
- b. Eliminating substantial, direct head-to-head competition between CCI and Triad;
- c. Substantially increasing the risk of unilateral exercise of market power;

- d. Increasing prices for electronic catalogs and MIS systems integrated with an electronic catalog; and
- e. Reducing service to customers of electronic catalogs and MIS systems integrated with an electronic catalog.

G. VIOLATIONS CHARGED

18. The agreements described in paragraph three violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

19. The acquisition of the outstanding shares of Triad by CCI, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed merger of Cooperative Computing, Inc. ("CCI"), and Triad Systems Corporation ("Triad"), and it now appearing that CCI, hereinafter sometimes referred to as the "respondent," is willing to enter into an agreement containing an order to divest certain assets and providing for other relief, and respondent having been furnished with a copy of a draft complaint that the Bureau of Competition has presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Clayton Act and Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission, having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed, consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments received, now in further conformity with the procedure

prescribed in Section 2.34 of its Rules, makes the following jurisdictional findings and enters the following order:

1. Respondent Cooperative Computing, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 6207 Bee Cave Road, Austin, Texas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*Respondent*" or "*CCI*" means Cooperative Computing, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Cooperative Computing, Inc., and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

B. "*Triad*" means Triad Systems Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 3055 Triad Plaza, Livermore, California.

C. "*MacDonald*" means MacDonald Computer Systems, a corporation organized, existing, and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 25031 Avenue Stanford, Valencia, California.

D. The "*Acquisition*" means the purchase of shares of Triad common stock pursuant to the Offer to Purchase by CCI dated October 23, 1996.

E. "*Commission*" means the Federal Trade Commission.

F. "*CCI Products*" means the CCI Database, Database Technology, and Documentation, and all technical system documentation and user documentation relating thereto, including, but not limited to, a description of all data elements and all other

information necessary for the Acquirer to use and operate the products.

G. "*CCI Database*" means the CCI PartFinder[®] Electronic Catalog Database data current as of the date of delivery to the Acquirer, for all the product lines and data elements contained in the database as of the date of the Acquisition.

H. "*Database Technology*" means the API, Server Software, Support Software, and TIMDD.

I. "*API*" means CCI's J-CON[®] application program interface for the CCI PartFinder[®] Electronic Database, including all related documentation, current as of the date of the Acquisition.

J. "*Server Software*" means the CCI software utilized to retrieve vehicle data from the CCI Database when a valid request is received from a user, including all related documentation, current as of the date of the Acquisition.

K. "*Support Software*" means the CCI software and all related documentation or data, including, but not limited to, all documentation current as of the date of the Acquisition, and utilized to distribute, maintain or support the CCI Database, including but not limited to, all software for data entry, data extraction, and media creation.

L. "*TIMDD*" means all Triad Integration Module data definitions current as of the date of the Acquisition.

M. "*Documentation*" means all end user documentation associated with the CCI Products provided by CCI.

N. "*Updates*" means all additions, deletions and modifications to the CCI Database, which shall include updated data and information made available by respondent to any of respondent's customers as part of the respondent's standard, commercially available electronic catalog product. Upon delivery of an update, such update shall be considered to be included in the term "CCI Database."

O. "*VAR*" means a person or entity in the business of distributing hardware and/or software systems to warehouses, jobber/retail stores and/or service dealers in the automotive aftermarket but excludes any person or entity whose primary business is the distribution, sale, or installation of automotive parts and accessories.

P. "*Acquirer*" means either MacDonald or the person or entity approved by the Commission to acquire the CCI Products pursuant to paragraph II.B of this order.

Q. "*Proprietary Rights*" means all patents, patent applications, trade secrets, copyrights, trademarks and service marks, know-how, confidential information and other proprietary rights.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, at no minimum price, through a perpetual, royalty-free, transferable, assignable, and exclusive license with the right to use for any purpose, combine with other information, reproduce, modify, market and sublicense, the CCI Products in the United States and Canada. Provided, however, respondent may retain the right to sell, license or otherwise provide the CCI Products to customers of CCI MIS systems until such time as CCI is able to integrate the Triad electronic catalog database to CCI's MIS systems, but in no event for more than six (6) months from the date of delivery of the Database, and provided, however, respondent may retain the right to utilize the CCI Database Technology and Documentation to update, support and maintain an electronic catalog database for any CCI customer licensed by CCI prior to the end of the aforementioned six (6) month period.

B. Respondent shall divest the CCI Products as set forth in paragraph II.A to MacDonald, in accordance with the License Agreement entered into between CCI and MacDonald, dated February 13, 1997 (the "License Agreement"), no later than ten (10) days after the date on which this order is made final. Provided, however, that in the event respondent fails to divest the CCI Products to MacDonald because MacDonald, unilaterally and through no fault of respondent, breaches the License Agreement, respondent shall divest the CCI Products as set forth in paragraph II.A to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, within sixty (60) days after the date on which this order is made final. The purpose of the divestiture of the CCI Products is to ensure the continued use of the CCI Products in the same business in which the CCI Products are used at the time of the Acquisition, in competition with respondent, and to remedy any lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

C. Pending divestiture of the CCI Products, respondent shall take such actions as are necessary to maintain the viability and marketability of the CCI Products, including but not limited to updating the CCI Database on a regular schedule, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the CCI Products.

III.

It is further ordered, That:

A. If respondent has not divested the CCI Products, as required by paragraph II of this order, the Commission may appoint a trustee to divest the CCI Products. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A of this order, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

a. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

b. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the CCI Products.

c. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

d. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III.B.c to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

e. The trustee shall have full and complete access to the personnel, books, records and facilities related to the CCI Products or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

f. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondent from among those approved by the Commission.

g. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of

respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondent, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the CCI Products.

h. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

i. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A of this order.

j. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

k. The trustee shall have no obligation or authority to operate or maintain the CCI Products.

l. The trustee shall report in writing to respondent and the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That:

A. Respondent shall deliver the CCI Products to the Acquirer in machine-readable or other appropriate usable form.

B. After the CCI Products have been divested, respondent shall not exercise any right it may have, whether at common law, in equity, or in bankruptcy or reorganization (including through obtaining any equity interest in a reorganized debtor) or otherwise, to terminate the license granted pursuant to this order or to seek to have such license terminated, or to require, or seek to require, the Acquirer or its successor or assignee to return the CCI Products.

C. Respondent shall make no claim to ownership, title, or interest in any modifications of the CCI Products developed by Acquirer and any copies (in whole or part) thereof and any documentation developed by Acquirer relating thereto, and all Proprietary Rights therein, shall be the property of Acquirer.

D. Respondent shall provide to the Acquirer, updates to the CCI Database on a monthly basis, no later than the time that respondent provides updates to any of respondent's customers, in accordance with the License Agreement, for no more than two (2) years.

E. Upon reasonable notice to respondent from the Acquirer, respondent shall provide such assistance to the Acquirer as is reasonably necessary to ensure that the purpose of the divestiture of the CCI Products is accomplished. Such assistance shall include reasonable consultation with knowledgeable employees of respondent for a period of time sufficient to ensure that the Acquirer's personnel are adequately trained in the sources and processing of the data contained in the CCI Products. Respondent, however, shall not be required to continue providing such assistance for more than twelve (12) months from the date of the divestiture and for no more than three hundred and fifty (350) hours during that twelve month period of time. Respondent may not charge Acquirer for such assistance, except for documented, out-of-pocket expenses (such as food, travel and lodging) incurred by respondent, which shall be billed to Acquirer as they occur.

F. Respondent shall not, for a period of twenty-four (24) months from the date of the divestiture, enter into or enforce non-competition agreements that have the purpose or effect of interfering with the ability of Acquirer to recruit or employ respondent's employees whose primary responsibility at respondent is, or during the six months prior to the Acquisition was, the development, programming, input and/or support of the CCI Database or Database Technology, provided that respondent may enter into or enforce existing confidentiality agreements with any of its employees.

G. Respondent, for a period of eighteen (18) months from the date of the divestiture, (1) shall not enter into any agreement with a VAR to provide, in the United States or Canada, any electronic catalog database, unless such agreement permits the VAR to terminate such agreement during the thirty (30) day period immediately preceding the first anniversary of such agreement; and (2) shall permit any existing agreement with a VAR to provide in the United States or Canada, any electronic catalog database, to be terminated by such VAR during the thirty (30) day period immediately prior to the first anniversary of the effective date of the License Agreement.

V.

It is further ordered, That within fifteen (15) days after the date this order is made final and every thirty (30) days thereafter until respondent has fully complied with the provisions of paragraph II of this order, and every sixty (60) days thereafter until respondent has fully complied with the provisions of paragraphs III and IV. A, D, E, F and G of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

VI.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and reasonable notice, respondent shall permit any duly authorized representative of the Commission:

A. Access, during normal office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the

possession or under the control of respondent relating to any matters contained in this order; and

B. Upon five (5) days' notice to the respondent, and without restraint or interference, to interview officers, directors, or employees of the respondent, who may have counsel present.

VII.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporations that may affect compliance obligations arising out of the order.

1721

Modifying Order

IN THE MATTER OF
THE STOP & SHOP COMPANIES, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3649. Consent Order, April 2, 1996--Modifying Order, June 20, 1997

This order reopens a 1996 consent order -- that required the respondents to divest specific supermarkets -- and this order modifies the consent order by terminating the requirement that Stop & Shop divest, among other stores, two Purity Supreme supermarkets in Massachusetts, in part, because increased competition from other entrants has made it extremely unlikely that the stores can be divested.

ORDER REOPENING AND MODIFYING ORDER

On January 6, 1997, respondent The Stop & Shop Companies, Inc. ("Stop & Shop")¹ filed a Petition To Reopen and Modify Consent Order (Purity Supreme) ("Petition"). In its Petition, Stop & Shop requests that the Commission reopen the order in Docket No. C-3649 ("order") to set aside paragraphs II.A.3.a and II.A.6.a, which require Stop & Shop to divest Purity Supreme Store number 41 located at 630 American Legion Highway, Roslindale, Massachusetts ("the Roslindale store") and Purity Supreme store number 20 located at 525 Harvard Street, Brookline, Massachusetts ("the Brookline store"). The Petition addresses the remaining 2 of 17 supermarket divestitures required by the order. The Commission previously approved Stop & Shop's applications for divestiture of the other 15 supermarkets.

For the reasons discussed below, the Commission has determined that Stop & Shop has demonstrated that it is in the public interest to reopen and modify the order to set aside these divestiture obligations.

I. THE COMPLAINT AND ORDER

This matter arose out of the 1995 acquisition by Stop & Shop of all of the supermarkets and related assets owned and operated by Purity Supreme, Inc. ("Purity"). The complaint in this matter charged that Stop & Shop's acquisition of Purity violated Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Specifically, the complaint alleged

¹ On July 21, 1996, Koninklijke Ahold N.V., a Netherlands corporation, acquired substantially all of the outstanding voting shares of Stop & Shop.

that the effects of the acquisition may be substantially to lessen competition "in the retail sale of food and grocery products in supermarkets, and narrower markets contained therein"² in, among other markets, "Brookline [and] the Roslindale neighborhood in Boston . . ."³ At the time of Stop & Shop's acquisition of Purity, Stop & Shop and Purity directly competed in Brookline and Roslindale. The concern thus arose that Stop & Shop would likely be able unilaterally to raise prices in the Brookline and Roslindale markets.

The Commission accepted a consent agreement with Stop & Shop on October 18, 1995, and the resulting consent order became final on April 2, 1996.⁴ Under the terms of the order, Stop & Shop is required to divest, among other stores, "absolutely and in good faith," the Roslindale and Brookline, Massachusetts supermarkets.⁵ The purpose of these divestitures, as of the others, is to ensure the continuation of the Roslindale and Brookline stores as ongoing, viable enterprises engaged in the supermarket business and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.⁶

II. THE PETITION

In its Petition,⁷ Stop & Shop requests that the Commission modify the order to eliminate the remaining required divestitures under the order, the Roslindale and Brookline stores.⁸ Stop & Shop bases its Petition on changed conditions of fact and public interest considerations.⁹

² Complaint ¶ 9.

³ *Id.* ¶ 12.c.

⁴ Stop & Shop also entered into a separate consent agreement with the Massachusetts Attorney General. Generally, this agreement mirrors the terms of the Commission's consent agreement. *See Commonwealth of Massachusetts v. SSC Associates, L.P. and Stop & Shop Companies, Inc.*, No. 95-12377NG (D. Mass. Oct. 18, 1995) (Consent Decree).

⁵ Order ¶ II.A.

⁶ *Id.* ¶ II.B.

⁷ In support of its Petition, Stop & Shop provided the affidavits of Brian Hotarek, Vice President in charge of Real Estate and Development for the Stop & Shop Companies, Inc. ("Hotarek Affidavit"), and William C. Hamlin, Vice President, Chief Financial Officer and Secretary of C&S Wholesale Grocers, Inc. ("Hamlin Affidavit").

⁸ Order ¶¶ II.A.3.a. and II.A.6.a.

⁹ Stop & Shop does not assert that any change of law requires reopening the order.

Stop & Shop claims that there is no serious interest by potential acquirers in either store to be divested because of the increased competition surrounding each store and because of the decreased sales volume of the two stores. Stop & Shop claims that new entry has made it difficult for the Roslindale and Brookline stores to compete effectively in their respective markets.¹⁰ The record shows that a new Sav-A-Lot supermarket was opened immediately adjacent to the Roslindale store on January 20, 1996. Likewise, a new Star Markets superstore was opened less than one mile north of the Brookline store approximately 5 months before the order was issued by the Commission. In addition, a Trader Joe's store has opened less than one mile south of the Brookline store. There has been a significant decline in sales at both stores to be divested, which is likely to continue.¹¹

Stop & Shop asserts that operating the Roslindale and Brookline stores has caused significant losses to Stop & Shop and that it needs to end the losses being sustained by the Roslindale and Brookline stores to maintain Stop & Shop's competitive vigor in the relevant markets. Removing the divestiture requirement would enable Stop & Shop to close the stores, halting any further losses.¹²

III. STANDARD FOR REOPENING AND MODIFYING FINAL ORDERS

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").¹³

¹⁰ Petition at 7-10.

¹¹ Petition at 12-14.

¹² Petition at 17. See also *Hotarek Affidavit*, ¶¶ 16 and 18.

¹³ See also *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. Hart Letter at 5; 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), 1979-83 Transfer Binder, FTC complaints and orders (CCH) ¶22,007 at 22,585 ("Damon Letter"), at 2. For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, Docket No. C-2916, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. Damon Letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

IV. REOPENING AND MODIFYING THE ORDER IS IN
THE PUBLIC INTEREST

Based on the record in this matter, Stop & Shop has not demonstrated changes of fact that justify eliminating the remaining divestiture requirement. However, public interest considerations warrant ending the requirement to divest the Roslindale and Brookline supermarkets. Stop & Shop has demonstrated an affirmative need for the change, and the reasons to modify the order outweigh the reasons to retain the divestiture requirement as written.

A. Stop & Shop Has Not Demonstrated Changes of Fact

Reopening is not required for changes in circumstances that were reasonably foreseeable at the time the consent order was entered. See Pay Less Drug Stores Northwest, Inc., Docket No. C-3309, Letter to H.B. Hummelt (Jan. 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship, and eliminate the dangers that the order sought to remedy). With respect to the Roslindale market, the record shows that Sav-A-Lot's entry¹⁴ took place shortly before the order was issued by the Commission. Consequently, Sav-A-Lot's entry, as a factual matter, does not constitute the requisite significant change in circumstances that requires reopening of the order. Likewise, with respect to the Brookline market, Star's entry took place approximately five months before the order in this matter was issued by the Commission. Thus, as a factual matter, Star's entry does not constitute a changed fact that would warrant modification of the order with respect to the Brookline store.

Trader Joe's entry in Brookline also does not constitute a changed fact that eliminates the need for the divestiture of the Brookline store. Trader Joe's potential entry into the relevant market was not an unforeseen event; the record indicates that Trader Joe's was actively looking for sites for stores in the relevant Boston metropolitan area market, which includes Roslindale and Brookline, considerably before the order was issued by the Commission. More important, however, the Commission does not consider the Trader Joe's store to be a "supermarket" as that term is defined in the order and its entry

¹⁴ Although Sav-A-Lot offers many items sold through supermarkets, Stop & Shop has not demonstrated that the Sav-A-Lot carries all relevant product categories identified in paragraph I.E of the order. Nor has it demonstrated that the Sav-A-Lot carries the variety of brands and sizes within a category that would be found in Stop & Shop's comparable supermarkets. Nonetheless, it is evident that the Sav-A-Lot is attracting business away from Stop & Shop's supermarkets.

into the Brookline market thus does not remedy the competitive harm resulting from Stop & Shop's acquisition of the Purity supermarket in Brookline. *See* order ¶ I.E.

B. Public Interest Considerations

Stop & Shop has demonstrated an affirmative need to modify the order. The record in this case shows that Stop & Shop has made good faith efforts to locate purchasers for both the Roslindale and Brookline stores, but has been unable to divest the two stores. Stop & Shop engaged the services of a well-known investment banking firm to prepare offering packages to potential acquirers. Subsequently, Stop & Shop contacted numerous potential buyers regarding these supermarkets including, among others, parties who ultimately acquired other stores Stop & Shop was required to divest under the order. Stop & Shop offered the Roslindale and Brookline stores as part of larger packages, but the potential acquirers desired only the other assets. Stop & Shop also offered to divest the stores' equipment and fixtures for \$1 and to subsidize the rent, but again no acquirers expressed interest. In sum, none of the parties contacted was interested in acquiring either the Roslindale or the Brookline store.

When the order was entered, the Commission believed that the Roslindale and Brookline stores were divestable, and there is no indication that Stop & Shop has not properly maintained and operated these stores since entry of the order. The declining sales and losses experienced by the Roslindale and Brookline supermarkets thus do not appear to be caused by any failure of Stop & Shop to maintain them. Rather, the declining sales and losses appear to be primarily related to the recent entry by Star and Sav-A-Lot. Although the entries occurred prior to the order becoming final, neither Commission staff nor Stop & Shop anticipated the extent of competitive impact these two entrants have had on the Roslindale and the Brookline store, respectively.

The increased competition in Roslindale and Brookline has adversely affected the Roslindale and Brookline supermarkets' viability and marketability, and it appears that the two stores will continue to sustain significant losses. Consequently, continuation of the requirement to divest and the requirement to maintain the viability and marketability of the stores, which are steadily losing sales, imposes unanticipated costs on Stop & Shop that it asserts impede its ability to compete in the relevant markets. *See* Promodes, S.A., et al.,

Order Granting Request to Reopen and Modify Order Issued May 17, 1990 (January 28, 1994). This constitutes the affirmative need showing under the public interest test.

The remedial purpose of the order was to restore and increase competition in, among other markets, the Boston metropolitan area through the sale of a specified number of supermarkets, including the Roslindale and Brookline stores. Stop & Shop was able to divest all of the specified stores except the stores located in Roslindale and Brookline. These two stores could not be divested in more than fifteen months¹⁵ of serious efforts by Stop & Shop and the investment banker it retained to assist it in its divestiture efforts. Given Stop & Shop's efforts to divest, and the limited time remaining on the Brookline store's lease, it is extremely unlikely that the stores can be divested consistent with the terms of the order.

Stop & Shop asserts that it is suffering continuing losses due to the operation of the Roslindale and Brookline stores, which are competitively harming Stop & Shop. Because it is extremely unlikely that the stores can be divested, whether by Stop & Shop or by a trustee appointed by the Commission, the remedial purpose of the order will not be achieved. Accordingly, on balance, the need to achieve the marginal benefit of divesting two non-competitive supermarkets is outweighed by the continuing costs that the divestiture obligation is imposing on Stop & Shop.

Therefore, *It is ordered*, That this matter be, and it hereby is, reopened and that the Commission's order be, and it hereby is, modified to set aside paragraph II.A.3.a and paragraph II.A.6.a, as of the effective date of this order.

Commissioner Azcuenaga dissenting, and Commissioner Starek concurring in the result only.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The Commission today permits Stop and Shop to avoid its obligation under the order to divest two stores in the Boston, Massachusetts, area, because Stop and Shop has failed to divest the stores and the continuing effort to do so is costly. Although I did not agree that these two stores should be required to be divested,¹ the

¹⁵ Stop & Shop began its divestiture efforts immediately after signing the consent agreement in October 1995.

¹ See Separate Statement of Commissioner Mary L. Azcuenaga, Concurring in Part and Dissenting in Part, in *The Stop and Shop Companies, Inc.*, Docket C-3649 (April 8, 1996).

respondent's obligation under a final order of the Commission should not be so readily excused. The Commission's action opens the door for all respondents to postpone divestiture, claim that the effort is costly, and avoid the obligation under the order.

The order in this matter provides for the appointment of an independent trustee to accomplish divestiture if Stop and Shop fails to do so in a timely manner, but no trustee has been appointed. In *Promodes, S.A.*,² cited as precedent for modifying this order, the obligation to divest was set aside only after a trustee had been appointed and had failed to locate an acquirer for the stores required to be divested. The inability of the trustee to find an acquirer was cited in *Promodes* as "evidence that divestiture of the two stores [was] extremely unlikely." I concurred in *Promodes*,³ on the ground that "[i]f the trustee cannot identify potential buyers, continued imposition of the divestiture requirement no longer serves the public interest." Comparable evidence of the public interest is not available here, because no independent trustee has been appointed. We have instead allegations of burden resulting from costs that surely were anticipated at the time the order was signed. See *Louisiana-Pacific Corporation*, 112 FTC 547 (1989).

I dissent.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I concur in the decision to reopen and modify the order, relieving the respondents of the obligation to divest certain supermarkets in Chattanooga, Tennessee. The Commission-appointed trustee, during a 21-month period, has not accomplished the required divestitures. In classic understatement, the Commission concludes that the trustee's lack of success is "evidence that divestiture of the two stores is extremely unlikely."

A Commission-appointed trustee serves as a neutral arbiter to establish whether the divestiture required by the order can be accomplished (assuming the trustee's good faith and diligence and the absence of evidence that the respondent has frustrated the trustee's efforts). If the trustee cannot identify potential buyers, continued imposition of the divestiture requirement no longer serves the public

² *Promodes, S.A.*, Order Granting Request To Reopen and Modify Order Issued May 17, 1990 (Jan. 28, 1994), reprinted in 5 Trade Reg. Rep. (CCH) ¶ 23,540.

³ A copy of my concurring statement in *Promodes* is attached.

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Concurring Statement

interest. In these circumstances, the requirement imposes costs, and the respondent need not make a particularized showing of those costs.

The Commission has in the past recognized that an obligation to divest particular assets may be modified in the public interest when the respondent "has been unable to find an acquirer [for those assets] at any price." *RSR Corporation*, 98 FTC 872 (1981); compare *Louisiana-Pacific Corporation*, 112 FTC 547, 561 (1989) (asserted financial disadvantage distinguished from impossibility). The trustee having failed to effect divestiture, the requirement now should be lifted.

Response to Petition

123 F.T.C.

Re: Altmeyer Home Stores, Inc. Petition to Quash or Limit Civil Investigative Demands. File No. 962-3063.

February 12, 1997

Dear Mr. Farnan:

This is to advise you of the Federal Trade Commission's ruling on the Petition to Quash Civil Investigative Demands ("Petition") that you filed on behalf of your client, Altmeyer Home Stores, Inc. ("Altmeyer" or "Petitioner"), in the above-referenced matter.

The ruling set forth below has been made by Commissioner Roscoe B. Starek, III, pursuant to authority delegated under Commission Rule of Practice 2.7(d)(4), 16 CFR 2.7(d)(4). Pursuant to Rule 2.7(f), 16 CFR 2.7(f), within three days after service of this decision, Petitioner may file with the Secretary of the Commission a request for full Commission review. The timely filing of such request shall not stay the return date in this ruling unless the Commission otherwise specifies.

Commissioner Starek has carefully reviewed the petition and the accompanying materials. He has also considered the oral presentation on the Petition conducted on January 21, 1997. The Petition is granted in part and denied in part for the reasons discussed below.

I. BACKGROUND

The Civil Investigative Demands ("CIDs") in this matter arise in the context of a Commission investigation to determine whether Altmeyer may have engaged in acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended, and the Fair Credit Reporting Act ("FCRA") provisions regarding the use of credit reports for employment purposes.¹ On March 22, 1995, staff of the FTC's Chicago Regional Office sent a letter to Altmeyer requesting that the company voluntarily provide certain information and documents regarding its policies and procedures for the FCRA in connection with Altmeyer's use of consumer reports for employment purposes. By letter dated May 2, 1995, you, as counsel for Altmeyer, agreed to permit FTC staff to

¹ The relevant provision of the FCRA is Section 615(a), 15 U.S.C. 1681m(a), which requires users of consumer credit reports, who deny employment applications based in whole or in part on those reports, to provide consumers with the name and address of the consumer reporting agency from which they obtained the report.

inspect the requested information and documentation at your Pittsburgh law office between May 8, and May 25, 1995. Letter from Thomas J. Farnan to John Hallerud, FTC Chicago Regional Office (May 2, 1995). According to FTC staff, you then indicated in a conversation with John Hallerud, the FTC attorney responsible for the investigation at the time, that Altmeyer lacked the necessary policies and procedures for complying with the FCRA. Based on the information from this purported conversation, FTC staff decided to forgo inspecting Altmeyer's documents. Instead, FTC staff offered Altmeyer the opportunity to enter into a consent agreement resolving the investigation without further expense to the company. You have strongly denied that you ever made such a statement to FTC staff, and maintain that Altmeyer is and was in compliance with the law. Letter from Thomas Farnan to Commissioner Roscoe B. Starek, III (Jan. 23, 1997). *See also* Letter from Thomas Farnan to C. Steven Baker, FTC Chicago Regional Office (November 6, 1996).

Later FTC staff renewed its request for access to Altmeyer's documents and information regarding compliance with the FCRA and, once again, you (acting on behalf of the company) agreed to cooperate voluntarily with the request. Instead of providing FTC staff with access to the requested materials from the entire period under investigation (January 1994 to the present), however, Altmeyer submitted only materials from the months of October 1995, March 1996, and September 1996. FTC staff considered this response unsatisfactory because it provided information about Altmeyer's practices and procedures that occurred after the company learned that a Commission investigation was underway. At this point, you withdrew Altmeyer's offer to produce the requested materials voluntarily.

When the prospects for further cooperation between Altmeyer and FTC staff in the investigation appeared remote, the Commission issued two CIDs on December 2, 1996. The CIDs were authorized by the Commission's resolution of June 27, 1990, directing the use of compulsory process in FTC investigations to determine whether unnamed consumer reporting agencies or others are engaged in unfair or deceptive acts or practices in violation of Section 5 of the FTC Act and in violation of the FCRA. One of the CIDs required the

production of 16 categories of documents. The other CID required the oral testimony of Altmeyer's Vice President, Judy Altmeyer.²

On December 18, 1996, the Secretary of the Commission received the Petition from Altmeyer objecting to the CIDs. Pursuant to the Commission's Rules of Practice, a petition to quash or limit a CID must be filed within 20 days after service of the CID (or, if a return date is less than 20 days after service, before the return date). 16 CFR 2.7(d)(1). Because the return date for the CID requesting the production of documents was December 16, the instant Petition (received by the Commission on December 18) was not timely as to this CID. Petitioner neither requested additional time to file a response to that CID nor advanced any explanation for the late filing. The Petition, however, was timely with respect to the CID requesting oral testimony. Despite Petitioner's failure to comply fully with the Commission's procedural requirements for submitting a timely petition to quash, the Commission has determined that it will not dismiss the petition on this basis and will consider each of Petitioner's objections.

II. SPECIFIC OBJECTIONS

- A. *Petitioner alleges that before it must produce the requested documents and testimony, the Commission is required to present evidence that Altmeyer violated the law.*

At the oral presentation, you stated that FTC's demand for access to information relating to Altmeyer's practices for complying with the FCRA amounted to a "fishing expedition." Oral Presentation Transcript at 5 (Jan. 21, 1997). You asserted that it is improper for the Commission to order production of the information covered by the CIDs without first advising Altmeyer of the evidence already in the Commission's possession that Altmeyer has engaged in unlawful activity. You also asserted a right to conduct discovery depositions relating to the bases for the Commission's investigation of Altmeyer. Oral Presentation Transcript at 6. Your argument is incorrect and does not take into account the broad scope of the Commission's investigatory powers and the procedural safeguards that are applicable to this agency's pre-complaint investigations.

² The CID requesting production of documents indicated a return date of December 16, 1996, and the CID for oral testimony specified a return date of December 27, 1996.

The Commission has broad investigatory powers to secure relevant information in order to determine whether a law violation has occurred. *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950) (analogizing FTC's compulsory process powers to those of a grand jury). As the Supreme Court stated, the FTC "does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *Morton Salt*, 338 U.S. at 642-43. *Accord*, *FTC v. Carter*, 636 F.2d 781, 786 (D.C. Cir. 1980); *FTC v. Texaco, Inc.*, 555 F.2d 862, 873, n.23 (D.C. Cir.) (*en banc*), *cert. denied*, 431 U.S. 974 (1977). The Commission's power to compel the production of documents and testimony from the target of an investigation through a subpoena is not conditioned on the possession of a specific quantum of evidence or a showing of probable cause to believe that the law has been violated. *United States v. Powell*, 379 U.S. 48, 57 (1964) (rejecting a probable cause requirement); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 216 (1946) (same).³ Indeed, it is well established that the Commission may compel the production of information provided that it is sought for a legitimate purpose and is "reasonably relevant" or not "plainly irrelevant" to that purpose, and that the inquiry is not too indefinite or unduly burdensome. *Morton Salt*, 338 U.S. at 652-53, *FTC v. Anderson*, 631 F.2d 741, 744-45 (D.C. Cir. 1979). Finally, with respect to the issue of relevance, courts have ruled that these standards are far less rigid in the context of an agency investigation than in an adjudicative matter, *FTC v. Green*, 252 F. Supp. 153 (S.D.N.Y. 1966), and have generally deferred to an agency's appraisal of relevance which "must be accepted so long as it is not obviously wrong." *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1255 (1993).⁴

³ You have stated that you are unaware of any legal decision in which a court has required a corporation to open its private files to a government agency without articulating a reason to believe that the law is being violated. Oral Presentation Transcript at 14. As support for this view, you cited (*id.* at 15) to *Micro Motion, Inc. v. Kane Steel Co., Inc.*, 894 F.2d 1318, 1327 (Fed. Cir. 1990), a patent infringement case involving two private parties engaged in a discovery dispute. In that case, the appellate court ruled that one of the private parties to the lawsuit could not obtain discovery of certain information held by a non-party based on only "a bare allegation of wrongdoing." That private discovery decision case is not relevant to the FTC matter at hand, which involves the exercise of the agency's power to gather evidence in an investigation by subpoena.

⁴ The relevance of a CID is measured against the scope and purpose of an agency's investigation, which in this instance are set forth in the Commission's Resolution authorizing issuance of compulsory process, attached to the CIDs. *FTC v. Texaco*, 555 F.2d at 874. Moreover, it is respondent's burden to show that the information sought by the investigative demand is irrelevant. *FTC v. Invention Submission Corp.*, 965 F.2d at 1090.

It is clear that the target of a Commission investigation such as Petitioner does not have the rights accorded to a litigant in an adjudicative proceeding. In carrying out its investigative functions, the Commission may proceed on a non-public, *ex parte* basis against targets without according adjudicative procedures such as discovery of any evidence that may have been gathered or the right to confront witnesses called by the agency. *Hannah v. Larche*, 363 U.S. 420, 440-41, 446 (1960); *Genuine Parts Co. v. FTC*, 445 F.2d 1382, 1387-88 (5th Cir. 1971); see *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 742 (1984). Due process rights do not apply in this context because the agency's investigation does not involve an allegation of wrongdoing or an adjudication of legal rights. *SEC v. Jerry T. O'Brien*, 467 U.S. at 742. Such procedural rights will attach only if and when the Commission determines to issue a complaint against Altmeyer. See *Hannah v. Larche*, 363 U.S. at 446.

The CIDs at issue in this matter seek production of relevant information to help the Commission to determine whether Altmeyer may have engaged in conduct that violates the FTC Act and the FCRA. Accordingly, at the pre-complaint phase of the investigation, Altmeyer is not entitled to the procedural rights that would apply to an adjudication. No formal charges against Altmeyer need be formulated in order to secure information relevant to the Commission's investigation. Further, the Commission is under no obligation to divulge to Altmeyer any evidence of wrongdoing that it might have in its possession as a prerequisite to demanding the information from Altmeyer covered by the CID. Accordingly, Petitioner's objection to the CIDs on this basis is denied.

B. Petitioner argues that the CIDs violate the Fourth Amendment.

Petitioner also seeks to quash the CIDs on the ground that they violate the Fourth Amendment prohibition against unreasonable search and seizure. Petitioner argues that the Federal Government is held to a higher standard when it seeks to enter the premises of a private citizen and gain access to private documents. Petition at 2. Petitioner further contends that, in defining the Federal Government's right to enter the private property of a citizen to conduct an investigation, courts have required that the government have "some kind of probable cause or even reasonable suspicion that a violation is taking place." *Id.* See also Oral Hearing Transcript at 8-10.

In raising this objection, Petitioner has overlooked the critical distinction between an actual search and an agency subpoena, as well as the difference between rights of privacy for a corporation and an individual. The Fourth Amendment standards applicable to a search are more stringent than those governing an agency subpoena. *Donovan v. Lone Star, Inc.*, 464 U.S. 408, 413-15 (1984); *FTC v. Carter*, 636 F.2d at 787. As the Supreme Court explained in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. at 195, agency subpoenas "present no question of actual search and seizure, but raise only the question whether orders of the court for production of specified records have been validly made ***." *Accord, FTC v. Carter*, 636 F.2d at 787-88. It is thus clear that when the Commission investigates by subpoena, the Fourth Amendment simply is not implicated.

The CID requiring Altmeyer to produce specified documents does not require the company to submit to anything resembling a search within the meaning of the Fourth Amendment. Furthermore, Instruction 10 of the CID requesting production of documents permits Altmeyer to avoid the presence of FTC staff on its premises simply by sending the responsive materials to the Commission.⁵ In fact, the instructions to this CID state that Altmeyer may comply with the demand by producing documents and information by mail if it prefers that Commission staff not enter its business premises. Altmeyer declined to pursue either of these options with Commission staff, choosing instead to file this Petition.

The instant case also does not implicate the privacy concerns that might arise if the agency were seeking to compel the production of private personal financial records from an individual who was not the target of the investigation. *In re McVane*, 44 F.3d 1127, 1136 (2d Cir. 1995). Here, the Commission is seeking corporate records and the testimony of a corporate officer in order to determine whether Altmeyer has complied and is complying with federal statutes that the agency is charged by Congress with enforcing. Thus, any assertion of personal privacy interests is misplaced. *See id.* at 1137. It has long been established that so long as a federal agency's demand for information issued to a corporation (or its agents) is not unreasonable, it will be enforced. *Morton Salt*, 338 U.S. at 652. The CID requiring Judy Altmeyer to present oral testimony seeks information regarding

⁵ Section 20(c)(3)(B) of the FTC Act requires the recipients of a CID only to make documents "available for inspection and copying or reproduction." 15 U.S.C. 57b-1(c)(3)(B).

matters within the scope of her official position as an owner of Altmeyer. This information is clearly relevant to the FTC's inquiry to determine whether Altmeyer is in compliance with the law and does not implicate a Fourth Amendment privacy concern. Similarly, no Fourth Amendment concerns is implicated by the CID requesting production of corporate document. Petitioner's challenge to the CIDs based on Fourth Amendment protection is thus denied.

C. Petitioner asserts that the CIDs are unduly burdensome and overbroad.

Petitioner also argues that Altmeyer has already made the documents covered by the CIDs available to the Commission voluntarily. The Petition states that requiring the company to produce the same materials again, for a second time, is "patently harassing, oppressive and vexatious."⁶ Petition at 2. In raising this objection, Petitioner appears to assert that FTC staff's decision not to follow up on Altmeyer's initial offer to inspect the documents on a voluntary basis precludes the Commission from seeking them on a compulsory basis later. In addition, Petitioner argues that the CID requesting production of materials seeks access to documents and categories of documents that exceed the scope of the FTC staff's investigation of Altmeyer. See Petition at 3. You also raised these arguments on behalf of your client at the oral presentation.

Petitioner has not met the heavy burden to sustain either of these allegation, which the Commission construes as objections to the reasonableness of the CIDs. As the court stated in *FTC v. Texaco Inc.*, ". . . the question is whether the demand is unduly burdensome or unreasonably broad." 555 F.2d at 882 (emphasis in original). The court said:

Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest. The burden of showing that the request is unreasonable is on the subpoenaed party. Further, the burden is not easily met where . . . the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose ***. Thus, courts have refused to modify investigative subpoenas unless compliance threatens to disrupt or seriously hinder normal operations of a business.

Id. (footnotes omitted).

⁶ Because the holiday season is over, Petitioner's argument regarding the burden of complying with the CIDs during Christmas has become moot.

Petitioner simply asserts, without either factual or legal support, that Altmeyer will be harmed by having to undertake the task of producing documents for the Commission a second time and presenting Judy Altmeyer for testimony. You stated at the oral presentation that it had been burdensome and costly for the company to gather the records the first time because "there are hundreds and thousands of them," and that it would be similarly burdensome to do so again. Oral Presentation Transcript at 11-12. You also stated that requiring Judy Altmeyer to appear to give testimony would be burdensome because "you are asking a woman to take a day off" (*Id.* at 12) and that "[a]ny endeavor that takes Judy Altmeyer or anyone else at Altmeyers out of their normal management duties is oppressive." *Id.* at 9.

Neither of these objections, however, even comes close to the standard articulated in *Texaco* -- that the burden of compliance must "threaten[] to disrupt or seriously hinder normal operations." More significantly, there is no indication that at any time you told FTC staff that complying with the CID timetables would cause great hardship to Altmeyer or Ms. Altmeyer. You never asked FTC staff for an extension of time to respond to the CIDs in order to lessen the alleged burden of production.

It should be noted that Altmeyer's initial agreement to make the requested corporate documents available to FTC staff voluntarily, and its production of a portion of these materials, do not make clear why complying with the CIDs at this time would be unduly burdensome for the company. In fact, the previous willingness of the company to produce these documents voluntarily suggests that collecting and providing them to staff at the present time is not unduly time-consuming.⁷

Petitioner has also failed to demonstrate that the CID seeking access to documents is unreasonably broad in light of the Commission's need for such materials. The Petition did not indicate which specific aspect of the CID is alleged to be overbroad. At the oral presentation, you objected only to Specification 1's requirement to produce articles of incorporation, bylaws, minutes, and annual reports for Altmeyer as examples of excessively broad requests. Oral

⁷ In rendering a decision on Petitioner's assertion of undue burden, the Commission need not resolve the factual dispute between Petitioner and the FTC staff regarding the circumstances surrounding the staff decision not to review Altmeyer's documents when voluntarily offered for inspection in May 1995. Oral Presentation Transcript at 6, 19-25. This dispute raises the issue of Altmeyer's substantive compliance with the law, which is not ripe for determination at this stage of the investigation.

Presentation Transcript at 10. On its face, this CID calls only for minimal information on Altmeyer's corporate organization and management (Specifications 1-6). The remaining specifications (7-16) call for information specifically directed to Altmeyer's policies and procedures for complying with the FCRA. For example, it is certainly necessary for the Commission to seek information on related entities (Specification 3) to determine what entities might possess information relevant to the investigation and who is legally responsible for any violations that may be uncovered. Similarly, information on corporate management and compliance with the FCRA (Specifications 6 and 12) is essential for obtaining relevant testimony and information on compliance and for assessing personal responsibility for any violations that might be uncovered. Each of the specifications is narrowly tailored to obtain information germane to the Commission's investigative purpose as set forth in the Resolution.

Further, the CID seeking document production is itself self-limiting in significant respects and provides Altmeyer with various options for minimizing its scope. For instance, Instruction 6 of the CID permits substitution of written statements in lieu of documents for certain specifications. In addition, Instruction 11 specifically permits Altmeyer to submit a negotiated sample of applicant files if the required response to Specification 16 involves more than 500 files. Instruction 11 also provides that, if Altmeyer believes the scope of the demand can be narrowed consistent with the FTC's need for information, the company is encouraged to discuss possible modifications with FTC staff. Finally, Instruction 12 provides that documents that have previously been provided to the Commission need not be produced again.

However, in recognition of the fact that Altmeyer has incurred some expense in providing documents to the Commission, Specification 1 of the CID requiring production of documents is modified to delete the requirement to produce corporate "by-laws." Specification 1 is also modified to require the production of corporate "minutes" only insofar as the minutes discuss the FCRA, "Altmeyer['s]" (as this term is defined in the CID) compliance with that statute, or any change in corporate policy or policies relating to the FCRA.

D. Petitioner asserts that a cease and desist order is unnecessary.

Petitioner also argues that because Altmeyer has supplied documents to the Commission that allegedly demonstrate its current compliance with the FCRA, there is no need for a cease and desist order, and presumably there is no basis for the CIDs to be upheld. Petition at 3. It is premature for Altmeyer to raise the defense of subsequent compliance with the law at this stage, when the Commission has yet to consider whether a law violation has occurred. Once the Commission has gathered the necessary information, the agency can turn to the task of assessing whether the company violated or has ceased violating the FCRA and what the appropriate remedy for such practices might be.

In addition, in raising this argument, Petitioner overlooks the fact even if Altmeyer did bring itself into compliance with the FCRA upon learning of the Commission's investigation, neither is that a defense to liability for violating the FCRA nor does it relieve the company of its responsibility to comply with a validly issued subpoena. "Voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the cases, *i.e.*, does not make the case moot," unless the defendant meets the heavy burden of demonstrating that "there is no reasonable expectation that the wrong will be repeated." *SCM Corp. v. FTC*, 565 F.2d 807, 812 (2d Cir. 1977) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). Accordingly, Petitioner's argument that a cease and desist order is unnecessary because Altmeyer is in compliance with the FCRA does not provide a basis for quashing the CIDs.

III. CONCLUSION

For the foregoing reasons, the Petition is granted in part and denied in part. Pursuant to Rule 2.7(e), Petitioner is directed to comply with the CID for documentary evidence (except as modified *supra* at 8) on or before February 26, 1997 and with the CID for oral testimony on or before March 12, 1997.

Pursuant to Rule 2.7(f), 16 CFR 2.7(f), within three days after service of this decision, Petitioner may file with the Secretary of the Commission a request for full Commission review. The timely filing of such request shall not stay the return date in this ruling unless the Commission otherwise specifies.

**Re: Altmeyer Home Stores, Inc. Petition for Review by
Full Commission Pursuant to Rule 2.7(f).
File No. 962-3063.**

February 21, 1997

Dear Mr. Farnan:

The Commission has considered (a) the Petition to Quash the Civil Investigative Demands ("CID") that you filed on behalf of Altmeyer Home Stores, Inc. ("Petition"); (b) the transcript of the oral presentation on the Petition, held on January 21, 1997; (c) the February 12, 1997 letter ruling by Commissioner Roscoe B. Starek, III, granting in part and denying in part the Petition; (d) your request, filed on February 14, 1997, for full Commission review of that letter ruling; and (e) the CIDs at issue.

The Commission has determined that your request for full Commission review does not raise any new issues regarding the Petition, and that the Petition was properly denied in part and granted in part for the reasons stated in the February 12, 1997 ruling. Accordingly, the full Commission concurs with, and hereby adopts, the February 12 letter ruling in this matter.

The February 12 letter ruling specified a February 26, 1997 return date for the CID for documentary evidence and a return date of March 12, 1997 for the CID for oral testimony. Your request for full Commission review did not stay those return dates. Altmeyer Home Stores, Inc. is thus directed to comply with the CIDs by those dates.

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